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UNIVERSITY OF ALBERTA

PRE-TRIAL PUBLICITY AND THE CRIMINAL JUSTICE SYSTEM

BY

SUSAN A. RADKE ©

A THESIS
SUBMITTED TO THE FACULTY OF GRADUATE STUDIES AND
RESEARCH IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF MASTER OF LAWS

FACULTY OF LAW

EDMONTON, ALBERTA
SPRING, 1991

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Prof. Jim Hackler

Date: April 8, 1991

DEDICATION

This Thesis is dedicated to my husband Allan D. Radke, whose support and encouragement sustained and inspired me throughout the research and writing of the Thesis.

ABSTRACT

Pre-trial publicity about an accused and his or her involvement in the criminal justice system may have significant implications for the fairness of the accused's criminal trial. Indeed, pre-trial publicity can be so prejudicial and widespread that it taints the impartiality of those who will hear the accused's case and prevents the accused from being fairly tried before an impartial tribunal.

The Canadian legal system has long recognized the effects of pre-trial publicity on an accused's rights and has utilized a number of responses to deal with those effects. Some of these responses, such as prior restraints, prevent the publication of pre-trial publicity. Some of these responses, such as contempt of court proceedings, the procedural safeguards set out in the *Criminal Code*, and defamation proceedings, deal with the effects of pre-trial publicity once it has been published and has reached the public.

The Canadian philosophical approach behind these responses has traditionally been to give the accused's rights priority over the media's competing freedom of expression. While the *Canadian Charter of Rights and Freedoms* gives both freedom of expression and the right to a fair trial constitutional status, Canadian courts will likely continue to resolve the conflict between freedom of expression and the accused's rights in the same manner.

Of course, Canada is not the only country that must deal with the effects of pre-trial publicity. In the United States, the courts give priority to freedom of expression and rely almost exclusively upon procedural safeguards to cure the problems created by pre-trial publicity. In England, the courts give priority to an accused's right to a fair trial and rely almost exclusively upon contempt of

court proceedings to punish those responsible for publications affecting this right.

The Canadian approach of utilizing measures to both prevent the publication of pre-trial publicity and to counter its effects once it has been published is the most effective and balanced of these three approaches. However, it is by no means perfect. Each of these legal responses needs reform in order to more effectively protect an accused's rights in the face of pre-trial publicity.

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CHAPTER 1

INTRODUCTION

Publicity about criminal proceedings and about the criminal justice system can be compelling and controversial. However, while publicity about criminal matters may grip the public imagination, may inform and educate the public about the operation of the criminal justice system, and may ensure that justice is not only done but is seen to be done, that same publicity may also destroy an accused's right to a fair and impartial trial.

This danger to an accused's fair trial is created largely by publicity that arises prior to the trial and that concerns matters and information which are highly prejudicial to an accused. For instance, the pre-trial publication of an accused's confession or of an accused's criminal record creates a significant risk to the fairness of the accused's subsequent criminal trial: potential jurors and the judge may, as members of the general public, be exposed to such information, and may as a result either consciously or unconsciously form an opinion as to the accused's guilt well before the start of the trial. The accused may thus be tried and convicted on the basis of this extraneous information which is revealed before the trial begins and which is subject to none of the usual rules and safeguards surrounding the admissibility of evidence at criminal trials. As one commentator sums up the dangers of pre-trial publicity,

> The publicity that follows an individual's encounter with the criminal law also has negative implications for the fairness of his trial. The public's foreknowledge of certain aspects of the case can prejudice the outcome at trial. Information released into the community in which an accused will be tried can be quite destructive of the presumption of innocence. Details

> about the commission of the crime, about the fruits of investigation and about the accused himself can be highly inculpatory. Opinions as to guilt or innocence that are expressed by public officials or members of the press can set the minds of prospective jurors against an accused[1].

The pre-trial publication of highly prejudicial information may occur in some cases simply as a result of media inadvertence. It may also occur as a result of the nature of modern media organizations. Newspapers and other media organizations in Canada are run largely as corporations[2], where the commodity for sale is news, and where the bottom line is, as with any corporation in a competitive business world, profit. As one commentator put it, the major duty of those who manage corporations, such as the editors and publishers who manage a news organization, "...is to run the business of the corporation to return as much profit to its shareholders as is consonant with short and long term stability"[3].

Thus, each media organization's primary objective is to offer information and news which will attract the largest audience possible in order to maximize the organization's profit[4]. This is often achieved by sensationalizing news coverage, since the more spectacular and attention-grabbing the news and information, the larger the audience. However, sensationalistic news coverage also results in danger to an accused's fair trial. For instance, while sensational information concerning an accused's lengthy criminal record or an accused's remorseful confession to police is more likely to attract a larger audience than is a dry discourse on the complexities of the evidentiary rules governing criminal trials, this information is also likely to prejudice the accused's subsequent criminal trial.

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[1] J. Cameron, "Comment: The Constitutional Domestication of our Courts--Openness and Publicity in Judicial Proceedings under the Charter", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 331 at 338.

[2] A.W. MacKay, "Freedom of Expression: Is It All Just Talk?" (1989) 68 Can. Bar Rev. 713 at 720, 750; H.J. Glasbeek, "Comment: Entrenchment of Freedom of Speech for the Press--Fettering of Freedom of Speech of the People", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 100 at 103.

[3] Glasbeek, ibid.

[4] As J. Curran & J. Seaton put it, in Power Without Responsibility: The Press and Broadcasting in Britain, 3rd ed. (London: Routledge, 1988) at 2, "the first objective of the media has always been to attract an audience. Hence press and broadcasting have sought to provide instantly appreciable material that is loosely described as 'entertainment' ". See also G.O.W. Mueller, "Problems Posed by Publicity to Crime and Criminal Proceedings" (1961) 110 U. Penn. L. Rev. 1 at 18.

This danger to an accused's fair trial is further exacerbated by the media's extensive resources and powers of dissemination[5]. Sophisticated communication technology has resulted in immediate and pervasive news coverage capable of reaching into every corner of the country. As one commentator sums up the impact of such news coverage,

> The electronic media and the sophisticated distribution systems of the print media can create widespread publicity for a trial whenever it might be held. The immediate publication or broadcast of pictures, interviews and commentary has a pervasive impact upon the community[6].

The resulting damage to an accused's fair trial, particularly in sensational and notorious cases, is inestimable[7].

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[5] Indeed, as A.W. Mewett points out in "Publicity and the Criminal Process" (1988-89) 31 Cr. L.Q. 385, in light of these resources and powers of dissemination, the nature of press coverage today means that an open, public trial is vastly different from what it was in the early common law days when the concept of an open, public trial was first adopted.

[6] S.M. Robertson, Courts and the Media (Toronto: Butterworth & Co. (Canada) Ltd., 1981) at 138.

[7] Pre-trial publication of prejudicial information may also be due to the Canadian media's own inadequacies. As P. Worthington states in "Freedom of the Press: A Response", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 143 at 147, "our problem with the media is not too many restrictions, but too little initiative, too little enterprise, undemanding proprietors and virtually no professionalism or training required to enter the trade. In other words, the media are to blame for their own inadequacies, though there is a constant effort to blame others, and especially government or bureaucracy". Likewise, M.D. Lepofsky stated on April 20, 1990, at the "Freedom of Expression and Democratic Institutions" conference held in Edmonton, Alberta, that the media are not "professionals" in that they receive no training and are not subject to either licensing or disciplinary measures.

The Canadian legal system has developed several different ways of dealing with prejudicial pre-trial publicity when it affects an accused's right to a fair trial before an impartial tribunal. For instance, the publication of prejudicial information arising from various pre-trial proceedings, such as the publication of an accused's confession given in evidence at a preliminary inquiry, can be delayed through the use of prior restraints[8]. These prior restraints are based either on specific Criminal Code[9] provisions or on a superior court's inherent power to control its own processes. They may take the form of direct bans on publication or, in some cases, of orders closing a court proceeding to the public and thus preventing public access to and publication about that proceeding. Regardless of the form they take, however, prior restraints are intended to forestall the problems caused by pre-trial publicity by preventing its publication in the first place.

Other legal responses to the problems created by pre-trial publicity are intended to deal with the effects of this publicity once it has been published and has reached the general public. Contempt of court proceedings, for example, are aimed at discouraging the publication of pre-trial publicity by punishing those persons responsible for pre-trial publicity which has reached the general public and which poses a risk of harm to the fairness or impartiality of an accused's pending criminal trial [10].

The use of various procedural safeguards set out in the Criminal Code is a third legal response to the problems created by pre-trial publicity[11]. These safeguards are intended to neutralize the effects of pre-trial publicity once it has reached the general public. For instance, a trial can be moved to a new location which has been less affected by the pre-trial publicity; a trial can be adjourned to allow for the prejudicial effects of the publicity to abate; an accused whose trial may be prejudiced by pre-trial publicity concerning a co-accused can ask that his or her trial be severed from that of the co-accused; a trial judge can declare a mistrial where pre-trial publicity has prejudiced the jury; an accused can seek to have his or her conviction overturned on appeal where pre-trial publicity caused a miscarriage of justice; potential jurors can be challenged and prevented from serving on the jury if they are shown to be biased as a result of the publicity; and the jury can be sequestered where this is necessary to insulate and protect the jury from sensational and pervasive publicity. Other safeguards include the oath sworn by each juror to impartially try the case upon the evidence presented to the court and not upon information learned from outside the courtroom; and the trial judge's instructions to the jury to determine the accused's guilt or innocence solely on the evidence heard in the courtroom during the trial.

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[8] Discussed in Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests, and Preliminary Inquiries".

[9] R.S.C. 1985, c. C-46.

[10] Discussed in Chapter 3, "Contempt of Court".

[11] Discussed in Chapter 4, "Procedural Safeguards".

A fourth legal response to the problems created by pre-trial publicity is that of defamation proceedings[12]. While defamation proceedings are not intended so much to ensure an accused's fair trial as to protect an accused's interest in his or her reputation where that reputation is damaged by pre-trial publicity, defamation proceedings are nonetheless another way of protecting the accused's rights in the face of pre-trial publicity.

Of course, Canada is not the only country which must deal with pre-trial publicity and its effects upon the criminal justice system. Indeed, these Canadian legal responses to the problems created by pre-trial publicity fall somewhere between the legal responses utilized in the United States and in England. In the United States, the courts rely almost exclusively upon procedural safeguards to counter the prejudicial effects of pre-trial publicity[13]. Prior restraints and contempt of court proceedings are considered unacceptable infringements upon freedom of expression, and are almost never used by the courts to deal with pre-trial publicity. As a result, the American media can publish whatever information it likes about an accused and his or her pending criminal trial without regard for the consequences such publication has for the accused's fair trial[14].

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[12] Discussed in Chapter 5, "Defamation".

In England, by contrast, the courts rely almost exclusively upon contempt of court proceedings to deal with prejudicial pre-trial publicity[15], and rarely use procedural safeguards and prior restraints. The emphasis in England is thus on deterring the publication of future prejudicial pre-trial publicity by punishing those responsible for current prejudicial pre-trial publicity, rather than on neutralizing the effects of the publicity once it has reached the public or on preventing its publication in the first place.

These differing legal approaches to the problems created by pre-trial publicity result in part from differing philosophical approaches to the conflict between freedom of expression and an accused's right to a fair trial[16]. In the

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[13] Discussed in Chapter 6, "The American Experience".

[14] In the words of C.W. Davey, "Comment", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 57 at 58, "...one of the most appalling aspects of the exercise of press freedom in the United States is the damage it has done to the concept of fair trial...".

[15] Discussed in Chapter 7, "The English Experience". For a general introductory discussion of the different approaches taken in England, Canada, and the United States to the problems created by pre-trial publicity, see A. Grant, "Pre-trial Publicity and Fair Trial--A Tale of Three Doctors" (1976) 14 Osgoode Hall L.J. 275.

[16] While freedom of expression and the right to a fair trial are perhaps the most significant of the values that are raised when studying the issue of publicity and the criminal justice system, they are not the only values. Other values raised by this issue include the privacy interests of trial participants, reducing crime by educating the public through publicized court proceedings, maintaining the court's authority and preserving judicial

United States, for instance, this conflict has been resolved in favour of freedom of expression. Thus, the legal responses that are used to deal with pre-trial publicity cannot infringe freedom of expression. As a result, the American courts are limited to using procedural safeguards to deal with the effects of pre-trial publicity, since procedural safeguards do not infringe upon freedom of expression.

In Canada, by contrast, this conflict between freedom of expression and the right to a fair trial has traditionally been resolved in favour of the right to a fair trial. As a result, Canadian courts have always been able to use contempt of court proceedings and prior restraints, which infringe to some extent upon freedom of expression, as well as procedural safeguards to deal with pre-trial publicity. Whether this will continue to be the case in the future remains to be seen. Indeed, the need to resolve this conflict has recently assumed new importance with the enactment of the Canadian Charter of Rights and Freedoms[17], which gives freedom of expression and the right to a fair trial constitutional status. As a result of the enactment of the Charter, it will be necessary to reassess this conflict and the balance that has traditionally been struck in favour of the right to a fair trial.

In order to understand the significance of this conflict, it is necessary to understand the importance of these concepts in Canadian society and in the Canadian judicial system. Freedom of expression[18] has always been considered a fundamental right which is central to the Canadian democratic

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dignity, and ensuring that justice is not only done but is seen to be done: M.D. Lepofsky, Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (Toronto: Butterworth & Co. (Canada) Ltd., 1985) at 11-12.

[17] Part I of the Constitution Act, 1982 [en. by Canada Act 1982 (U.K.), 1982, c. 11, Sched. B].

[18] For the purposes of this Thesis, freedom of expression and freedom of the media are considered together as one freedom, since it is generally accepted that freedom of the media is no different from or greater than freedom of expression and of speech: see, for instance, R. v. Rideout (1987), 67 Nfld. & P.E.I.R. 91 (Nfld. S.C.T.D.).

system and to Canadian society[19]. Duff, C.J., summed up the importance of this freedom by stating that our democratic system

> ...contemplates a parliament working under the influence of public opinion and public discussion. There can be no controversy that such institutions derive their efficacy from the free public discussion of affairs, from criticism and answer and counter-criticism, from attack upon policy and administration and defence and counter-attack; from the freest and fullest analysis and examination from every point of view of political proposals[20].

Prior to the enactment of the Canadian Bill of Rights[21] in 1960, however, this freedom was not specifically guaranteed under any Canadian legislation. As a result, legislation which infringed upon freedom of expression could be attacked only on the basis that it was ultra vires its enacting government. To put it another way, judicial protection of this freedom was submerged into the division of powers analysis[22], whereby the constitutionality of legislation is determined by analyzing the legislation to see if it falls within its enacting government's jurisdiction as set out under the Constitution Act, 1867[23].

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[19] C. Beckton, "Freedom of Expression--Access to the Courts" (1983) 61 Can. Bar Rev. 101 at 103-104; G.S. Adam, "The Charter and the Role of the Media: A Journalist's Perspective", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 39 at 52; Fraser v. Public Service Staff Relations Board, [1985] 2 S.C.R. 455; RWDSU v. Dolphin Delivery Ltd., [1986] 2 S.C.R. 573; Church of Scientology of British Columbia v. Radio NW Ltd. (1974), 46 D.L.R. (3d) 459 (B.C.C.A.); A.G. of Canada v. Law Society of British Columbia (1982), 137 D.L.R. (3d) 1 (S.C.C.); R. v. Keegstra (Dec. 13, 1990) (S.C.C.) [unreported]; Boucher v. R., [1951] S.C.R. 265; Edmonton Journal v. A.G. for Alberta, [1989] 2 S.C.R. 1326.

[20] Reference re Alberta Statutes, [1938] S.C.R. 100, aff'd (sub nom A.G. Alberta v. A.G. Canada) [1939] A.C. 117 (P.C.). This case is generally considered to be a landmark in the Supreme Court's development of our civil liberties: W.S. Tarnopolsky, "The Supreme Court and Civil Liberties" (1976) 14 Alta. L. Rev. 58 at 78.

[21] S.C. 1960, c. 44.

[22] C. Beckton, "Freedom of the Press in Canada: Prior Restraints", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 119 at 122; R. Moon, "The Scope of Freedom of Expression" (1985) 23 Osgoode Hall L.J. 331 at 333; MacKay, supra, note 2 at 715.

[23] Formerly the British North America Act, 1867.

Thus, legislation which offended freedom of expression could be struck down if it was also ultra vires its enacting government; it could not, however, be struck down solely because it infringed upon this freedom[24].

Although some Supreme Court of Canada members[25] attempted to give freedom of expression a quasi-constitutional status through the "implied Bill of Rights" theory[26], it was not until the Canadian Bill of Rights was enacted that this freedom became part of Canadian statute law[27]. However, although freedom of expression achieved a quasi-constitutional status under the Bill of Rights[28], and although the Bill authorized courts to construe and apply federal legislation so as not to infringe upon its rights and freedoms[29], the courts adopted a very cautious and narrow approach to this statute[30]. As a result, the Bill had only a limited effect upon the protection of fundamental freedoms such as freedom of expression[31].

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[24] In Reference re Alberta Statutes, supra, note 19, for instance, the Alberta government passed three bills aimed at creating a Social Credit economic order. One of these bills was intended to ensure the publication of "accurate" news and information by controlling what newspapers published about governmental policies and activities. These bills were struck down as being ultra vires the province, since they were part of the general scheme of social credit legislation which dealt with banking, trade and commerce, and currency subject matters, all of which fell under federal jurisdiction. Thus, even though this bill infringed upon freedom of expression, it was struck down because it was ultra vires the government, and not because of its impact on freedom of expression.

[25] See, for instance, the judgements of Rand, J., in Switzman v. Elbling, [1957] S.C.R. 285 and in Saumur v. Quebec (City of) and A.G. of Quebec, [1953] 4 D.L.R. 641 (S.C.C.).

[26] This theory was based on the preamble to the British North America Act, 1867, which stated that Canada would have a constitution similar in principle to that of the United Kingdom, which was based on a parliamentary democracy resting ultimately on public opinion reached by free and open discussion. By virtue of the preamble, Canada inherited this system of parliamentary democracy founded upon freedom of expression. Thus, the importance that freedom of expression played in this parliamentary system gave it an almost constitutional status. This theory was, however, laid to rest in A.G. (Canada) v. Montreal (City of), [1978] 2 S.C.R. 770, which held that freedom of expression was not so enshrined in the Constitution as to be above the reach of competent legislation. For a discussion of this "implied Bill of Rights" theory, see R. Stoykewych, "Street Legal: Constitutional Protection of Public Demonstrations in Canada" (1985) 43 U.T. Fac. L. Rev. 43; E. Cline & M.J. Finley, "Whither the Implied Bill of Rights? A.G. Canada and Dupond v. The City of Montreal" (1980-81) 45 Sask. L. Rev. 137; S.I. Bushnell, "Freedom of Expression--The First Step" (1977) 15 Alta. L. Rev. 93.

[27] s.1(d) of the Bill declared freedom of expression to be a fundamental freedom.

[28] As stated in Re Global Communications Ltd. and A.G. for Canada (1984), 10 C.C.C. (3d) 97 (Ont. C.A.), aff'g (1983), 5 C.C.C. (3d) 346 (Ont. H.C.).

[29] s.2.

The entrenchment of freedom of expression under s.2(b) of the Canadian Charter of Rights and Freedoms has given this freedom a constitutional status. As a result, it has acquired new dimensions and new importance. This may lead to a re-evaluation of the values that freedom of expression serves in society in general and in the criminal justice system in particular[32]. This may also lead to a re-evaluation of the role that the media plays in the criminal justice system[33].

In interpreting the scope of this freedom in the criminal justice setting, the courts will be required to take into account an accused's right to a fair and public trial before an independent and impartial tribunal. While the right to a fair trial has long been considered to be the foundation of our judicial system, it has now been entrenched and given constitutional status under s.11(d) of the Charter.

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[30] B. Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter" (1982) 28 McGill L.J. 31 at 32-33. As Lepofsky puts it, "The Canadian Bill of Rights had been interpreted in an exceptionally narrow way, at times straining the plain meaning of its words, because the Bill was an ordinary statute and not a component of the Constitution": supra, note 16 at 316.

[31] J.N. Lyon, "A Progress Report on the Canadian Bill of Rights" (1976-77) 3 Dal. L.J. 39. For a detailed discussion of the Bill of Rights, see W.S. Tarnopolsky, The Canadian Bill of Rights (Toronto: McClelland and Stewart Limited, 1975).

[32] These values are discussed in Chapter 2, "Pre-trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests, and Preliminary Inquiries", in relation to the Charter implications of prior restraints. To date, however, the courts which have considered freedom of expression in the context of an accused's right to a fair trial have not examined the values served by freedom of expression in any depth or detail, but have instead simply asserted that the accused's right to a fair trial must take precedence over freedom of expression.

[33] Indeed, courts interpreting the scope and meaning of freedom of expression as it relates to the criminal justice system will be venturing into a largely unchartered area, since pre-Charter freedom of expression cases dealt primarily with expression in a political speech context and not in a criminal justice context.

This right to a fair trial has many components. For instance, it means that the trial will be characterized by fairness and impartiality; that it will be conducted openly and in public[34], since "the greatest safeguard of civil liberties and the proper administration of justice is an open court"[35]; and that an accused's criminal liability will be determined on the basis of legally admissible evidence presented to the court, and not on the basis of extraneous information obtained outside of the courtroom[36].

All of these components of the right to a fair trial, however, can be threatened by prejudicial pre-trial publicity. Pre-trial publicity may destroy the fairness and impartiality of an accused's trial; may be so prejudicial as to require closing the courtroom to the public in order to prevent its publication; and may result in the accused being convicted on the basis of the publicity rather than on the basis of admissible evidence presented at trial.

Canadian courts have long recognized these dangers to an accused's fair trial and have utilized a variety of legal responses to both prevent and to minimize these dangers. However, while these legal responses may indeed preserve and protect the right to a fair trial, some of these responses, such as prior restraints and contempt of court proceedings, may at the same time infringe upon freedom of expression. Since both of these concepts have now acquired constitutional status under the Charter, the use of these legal responses brings these concepts into sharp conflict with each other.[37]

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[34] Although the right of access to open court proceedings can be limited in some situations: ibid.

[35] Robertson, supra, note 6 at 137. Many courts and commentators have stressed the importance of open court proceedings ; see, for instance, A.M. Linden, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 299; F.R.Smith, "Free Press--Fair Trial, A Question of Balance" (1985) 19 U.B.C. L. Rev. 74 at 86; R. v. Warawuk (1978), 42 C.C.C. (2d) 121 (Alta. S.C.A.D.); R. v. Robinson (1983), 5 C.C.C. (3d) 230 (Ont. H.C.); R. v. Rideout, supra, note 18.

[36] Smith, ibid; Law Reform Commission of Canada, Working Paper 56: Public and Media Access to the Criminal Process (Ottawa: Law Reform Commission of Canada, 1987) at 18-19.

The courts have approached this conflict between freedom of expression and the accused's right to a fair trial by recognizing that when Charter rights and freedoms in general come into conflict, they must be balanced with each other, and some of these rights and freedoms must give way to others[38]. To date, Canadian courts have generally held that freedom of expression must give way to an accused's right to a fair trial when these two concepts are in conflict[39]. Thus, Canadian courts have continued to resolve this conflict in the same manner as they did prior to the Charter's enactment.

The purpose of this thesis is to explore the Canadian legal responses to the problems posed by pre-trial publicity and the approach that Canadian courts have taken to resolving the conflict between freedom of expression and the right to a fair trial. Prior restraints are discussed in Chapter 2; contempt of court proceedings are considered in Chapter 3; procedural safeguards are explored in Chapter 4; and defamation proceedings are examined in Chapter 5. As will be shown throughout the discussion of these

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[37] Although some commentators have argued that there is no conflict, since the effects of pre-trial publicity can be negated through the use of procedural safeguards which protect the right to a fair trial but which do not infringe upon freedom of expression: Lepofsky, supra, note 16 at 3-4. However, in light of the inadequacy of these procedural safeguards, as is discussed in Chapter 4, "Procedural Safeguards", such arguments are naive.

[38] Many courts have stated that Charter rights are not absolute but must co-exist with and be balanced against each other: Fraser v. Public Service Staff Relations Board, supra, note 19; A.G. for Manitoba v. Groupe Quebecor Inc., [1987] 5 W.W.R. 270 (Man. C.A.); R. v. Sophonow (No. 2) (1983), 6 C.C.C. (3d) 396 (Man. C.A.); R. v. Zundel (1987), 56 C.R. (3d) 1 (Ont. C.A.), leave to app. ref. at xxviii.

[39] See, for example, R. v. Banville (1983), 3 C.C.C. 312 (N.B.Q.B.), aff'g (1982), 69 C.C.C. (2d) 520 (N.B. Prov. Ct.); Re Southam Inc. and R. (No. 2) (1982), 70 C.C.C. (2d) 264 (Ont. H.C.); R. v. Doyle (1988), 86 N.S.R. (2d) 26 (S.C.T.D.); R. v. Barrow (1989), 48 C.C.C. (3d) 308 (N.S.S.C.); R. v. Squires (1989), 69 C.R. (3d) 337 (Ont. Dist. Ct.), aff'g (1986), 50 C.R. (3d) 320 (Ont. Prov. Ct.); A.G. of Alberta v. Interwest Publications Ltd. (1990), 74 Alta. L.R. (2d) 372 (Q.B.).

Canadian legal responses, the judiciary's response to the conflict between freedom of expression and the accused's right to a fair trial has been to give precedence to the right to a fair trial and to deal with pre-trial publicity through measures aimed both at preventing its publication and at countering its effects once it has been published.

This is different from the approaches taken in the United States and in England. The American approach, which is discussed in Chapter 6, has been to uphold freedom of expression over the right to a fair trial, and to deal with pre-trial publicity by measures countering its effects once it has been published. The English approach, which is considered in Chapter 7, has been to uphold the right to a fair trial over freedom of expression, and to deal with pre-trial publicity primarily by measures aimed at punishing those responsible for the publicity.

While the Canadian approach to the problems posed by pre-trial publicity is arguably the most effective and the most balanced of these three approaches, it is by no means perfect. Indeed, significant drawbacks and difficulties exist with these legal responses to pre-trial publicity. For these responses to be truly effective means of dealing with pre-trial publicity, changes and reforms are needed. These are discussed in the concluding chapter, Chapter 8.

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CHAPTER 2

PRE-TRIAL PROCEEDINGS CREATING PRE-TRIAL PUBLICITY: PRIOR RESTRAINTS, CORONERS' INQUESTS, AND PRELIMINARY INQUIRIES

I. INTRODUCTION

Pre-trial publicity can arise during any stage of the criminal justice process, from the time that a person is suspected of having committed a criminal offence to the time of the trial for that offence. There are two main ways in which pre-trial publicity can arise during this time. First, pre-trial publicity can arise as a result of general, on-going developments in the case that occur throughout the time prior to trial as the police investigation unfolds and as new evidence and information about the matter are brought to light. Second, it can arise from specific pre-trial proceedings such as bail applications, change of venue applications, and preliminary inquiries.

The Canadian legal system has developed several different ways of dealing with pre-trial publicity when it threatens an accused's right to a fair trial. Where potentially prejudicial information is revealed as a result of on-going general developments in the case, contempt of court proceedings, various Criminal Code procedural safeguards, and defamation proceedings are all means of dealing with the effects of this information once it has been published and disseminated to the public. These are discussed in the following three chapters[1].

Where potentially prejudicial information is revealed at specific pre-trial proceedings, a court can issue orders banning the publication of such information pursuant either to various Criminal Code provisions or to its inherent common-law power to control its own processes. As well, a court can also issue orders closing the courtroom to the public, which has the indirect effect of preventing the publication of information about the proceedings taking place in that courtroom. These orders are often referred to as "prior restraints" on speech, since their effect is to restrain speech before it is published and disseminated.

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[1] Chapter 3, "Contempt of Court"; Chapter 4, "Procedural Safeguards"; and Chapter 5, "Defamation".

The remainder of this chapter focuses on these prior restraints that are used to control publicity arising from specific pre-trial proceedings. In particular, several topics will be considered. First, an overview of prior restraints will be presented. Second, two particular pre-trial proceedings--coroners' inquests and preliminary inquiries--will be considered in more detail. Finally, the Charter implications of prior restraints will be examined.

II. OVERVIEW OF PRIOR RESTRAINTS

Many pre-trial proceedings create publicity which can affect an accused's right to a fair trial. For instance, bail (judicial interim release) applications, change of venue applications, proceedings relating to various sexual offences, fitness to stand trial hearings, coroners' inquests, and preliminary inquiries are all proceedings which may result in publicity about a criminal matter and an accused. Publicity arising from these proceedings may be banned either by direct prior restraints taking the form of publication bans or by indirect prior restraints taking the form of closure orders.

Direct prior restraints, such as publication bans, operate as direct limits on the publication and dissemination of information to the public. They may be based either on various Criminal Code provisions giving specific statutory powers to a court to ban such publicity, or on a superior court's inherent common-law power to control its own processes[2].

In relation to the statutory bases for direct prior restraints, several Criminal Code provisions allow a court to ban the publication of information about a criminal matter and an accused where that information is revealed at certain types of pre-trial proceedings[3]. For example, the Code allows a court to ban the publication of information relating to a bail application. Pursuant to s.517 of the Code, an accused can request that a publication ban be placed on the evidence taken, the information given, the representations made, and the reasons given by the justice at a bail application[4]. If the accused so requests, the court must order the publication ban. As well, the court can also order this ban on its own initiative. The publication ban remains in effect until the accused is either discharged at a preliminary inquiry or the accused's trial has ended.

Likewise, publicity concerning proceedings relating to various sexual offences can be regulated by the court pursuant to ss.276 and 486(3) of the Code. Thus, evidence which is given at a hearing held pursuant to s.276(3) to determine its admissibility, and which relates to the complainant's sexual activity with persons other than the accused in sexual offence cases such as incest and sexual assault, cannot be published or broadcast. As well, the publication of information disclosing the complainant's identity in a sexual offence case can be banned pursuant to s.486(3) of the Code[5].

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[2] For a detailed discussion of the statutory and non-statutory bases for prior restraints, see M.D. Lepofsky, Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (Toronto: Butterworth & Co. (Canada) Ltd., 1985) at 64-92.

[3] The following general discussion of direct and indirect prior restraints does not cover those restraints used in conjunction with coroners' inquests and preliminary inquiries. These are dealt with in detail in the following two sections of this chapter.

[4] However, the court cannot ban the publication of the decision itself: Re Forget and R. (1982), 65 C.C.C. (2d) 373 (Ont. C.A.).

In addition to these Criminal Code provisions setting out statutory prior restraints, a superior court[6] may order publication bans on information revealed at pre-trial proceedings pursuant to its inherent common-law power to control its own processes[7]. For instance, a judge may rely on this inherent non-statutory power to order a publication ban on information arising from change of venue applications[8] or on information arising from fitness to stand trial hearings[9]. Use of this inherent non-statutory power to ban publicity arising from pre-trial proceedings is justified on the basis that the publicity interferes with the court's handling of the matter before it and with the court's ability to control its own processes.

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[5] Statutory bans on pre-trial publicity also occur in relation to proceedings involving young persons. The Young Offenders Act, R.S.C. 1985, c. Y-1, sets out several publicity bans. For instance, s.17 of this Act allows for a ban on publicity arising from an application to transfer a young offender from youth court to ordinary adult court. As well, s.38 allows for a publication ban on the identity of young accused, young victims, and young witnesses.

[6] A "superior court" is defined in s.1 of the Code. In Alberta, for instance, the Court of Appeal and the Court of Queen's Bench are superior courts. While provincial court is not a superior court, one court has held that this inherent common-law power is available to all courts of record and not only to superior courts: Re Church of Scientology of Toronto and R.(No. 6) (1986), 27 C.C.C. (3d) 193 (Ont. H.C.). On this analysis, provincial courts in Alberta would have an inherent common-law power to regulate their own proceedings through publication bans.

[7] Some commentators have criticized judicial use of this inherent power to justify imposing prior restraints on publication: see, for example, Lepofsky, supra, note 2 at 76-77.

[8] As has been done in several cases: see, for instance, R. v. Fosbraey (1950), 98 C.C.C. 275 (Ont. H.C.); R. v. Bryant (1980), 54 C.C.C. (2d) 54 (Ont. S.C.); R. v. Jansen, [1976] 4 W.W.R. 277 (B.C.S.C.); R. v. Miller (1979), 12 C.R. (3d) 126 (Ont. S.C.); Re Southam Inc. and R. (No. 2) (1982), 70 C.C.C. (2d) 264 (Ont. H.C.).

[9] See, for instance, R. v. Southam Press (Ontario) Ltd. (1976), 31 C.C.C. (2d) 205 (Ont. C.A.). A court has also relied on its inherent non-statutory powers to ban the publication of certain information arising from the accused's first trial prior to the jury selection for the new trial: R. v. Barrow (1989), 48 C.C.C. (3d) 308 (N.S.S.C.); and to ban the publication of the identities of persons whose conversations with the accused had been taped, where the admissibility of these tapes was being determined in a voir dire: Toronto Sun Publishing Corp. v. A.G. for Alberta, [1985] 6 W.W.R. 36 (Alta. C.A.).

Breaches of these direct prior restraints are punishable both by statute and by common law. The Code specifically makes breaches of many of its statutory publication bans to be summary offences[10]. In addition, s.127 of the Code makes it an indictable offence to disobey a court order in general, thus allowing for the punishment of persons who breach a court order banning publication. Further, those who breach these bans on publicity may also be punished at common law for contempt of court[11].

Potentially harmful information arising from pre-trial proceedings can also be dealt with by indirect prior restraints. Pursuant to s.486 of the Code, a court has the power to make a closure order excluding any or all members of the public from the courtroom for all or part of the proceedings against an accused where the judge believes it is in the interests of public morals, the maintenance of order, or the proper administration of justice to do so. The effect of such a closure order is to indirectly restrain speech: it prevents the public and the media from attending the proceeding, and thus prevents them from subsequently publishing information about that proceeding.

While pre-trial proceedings such as bail applications, change of venue applications, and fitness to stand trial hearings, can create publicity which significantly affects an accused's right to a fair trial, perhaps the most potentially prejudicial information is that which arises from two particular pre-trial proceedings: coroners' inquests and preliminary inquiries. Both of these proceedings can create prejudicial pre-trial publicity posing a significant risk to the impartiality of an accused's subsequent trial. However, the

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[10] For instance, s.486(5) makes publication of a complainant's identity in a sexual offence case, where an order has been made banning publication, a summary conviction offence.

[11] As is discussed in Chapter 3, "Contempt of Court". However, one case has held that breaches of court orders which are made specific offences under the Code cannot also be punishable at common law as contempt of court: R. v. Publications Photo-Police Inc. (1988), 42 C.C.C. (3d) 220 (Que. C.A.), under app. to S.C.C.

Canadian legal system has distinguished between these two proceedings and has dealt in very different ways with the publicity arising from each of them. The following two sections of this chapter discuss the nature of these proceedings, the risks that publicity from these proceedings poses to an accused's fair trial, and the prior restraints available to deal with such publicity.

III. CORONERS' INQUESTS

A. INTRODUCTION

A coroner's inquest is a pre-trial proceeding which poses a significant risk to the impartiality of an accused's subsequent criminal trial. Although the inquest is not part of the criminal justice system, and is in fact governed primarily by provincial legislation rather than by the Criminal Code[12], it nonetheless can be and often is used as a tool in a criminal investigation. Indeed, the evidence given and the findings of fact made at the inquest concerning the circumstances surrounding and the causes of a death may substantially influence the course of subsequent criminal proceedings[13]; are often used to further criminal investigation and prosecution[14]; and may result in the laying of criminal charges[15].

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[12] Although some Code sections do deal with the coroner's inquest: see s.128, making it an indictable offence for a coroner to wilfully misconduct himself during the execution of a process or to make a false return to the process; s.529, providing for a coroner's warrant and recognizance where a person has been alleged, by a coroner's inquisition verdict, to have committed murder or manslaughter but has not been charged with that offence; and s.576, providing that no person shall be tried on a coroner's inquisition.

[13] C. Granger, Canadian Coroner Law (Toronto: The Carswell Company Ltd., 1984) at 208.

[14] Ibid. at 268.

[15] C. Granger, "Crime Inquiries and Coroners Inquests: Individual Protection in Inquisitorial Proceedings" (1977) 9 Ottawa L. Rev. 441. For instance, in a recent B.C. inquest into the deaths of two persons travelling from Calgary, Alta. to Golden, B.C. who were killed when a load of steel pipes rolled from an oncoming truck onto their bus, the Crown stated

However, even though evidence and findings of fact arising from a coroner's inquest may be used as a tool in a subsequent criminal investigation and prosecution, witnesses who testify at an inquest are not given many of the legal safeguards that are given to accused at criminal proceedings. For instance, a witness who has not yet been charged with a criminal offence can be compelled to testify at an inquest and can not rely on any right to remain silent, even where it is clear that the testimony will result in criminal charges being laid against the witness. Likewise, a witness's confession or admission which becomes evidence at a coroner's inquest can be published by the media. This lack of legal safeguards poses a risk to the witness's fair trial if he or she is subsequently charged with a criminal offence.

This risk is further exacerbated by the fact that coroners' inquests are often highly publicized, particularly where the circumstances surrounding the death under investigation are considered newsworthy. As a result, the evidence given and the findings of fact made at an inquest may be publicized before the start of a subsequent criminal trial. This publicity poses a risk to the impartiality of jurors who, as members of the general public, have been exposed to this publicity before the criminal trial has begun, and, in many cases, before criminal charges have even been laid.

In order to understand the significance of the risk posed by a coroner's inquest to an accused's fair trial, two topics will be considered. First, the nature of a coroner's inquest will be briefly discussed. Second, the risks posed

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that it was awaiting the inquest's outcome to decide if criminal charges should be laid against the truck's driver: Calgary Herald (27 November 1990) B1.

The evidence given and the findings made at an inquest can also be used for civil litigation purposes in all Canadian jurisdictions: Granger, Canadian Coroner Law, supra, note 13 at 301. For instance, the lawyer for the families of these two persons killed near Golden, B.C., stated that the inquest's findings would be studied with a view to taking possible legal action: Calgary Herald (28 November 1990) A1,2.

by an inquest to an accused's trial will be examined, in relation both to the general risks created by the nature of the inquest itself and to the specific risks created by pre-trial publicity arising from the inquest.

B. NATURE OF THE CORONER'S INQUEST

In modern times[16], the coroner's inquest is a medico-legal death inquiry which is part of an official mechanism for investigating an individual's unusual or unnatural death[17]. This mechanism consists of two parts: a medical investigation into the facts surrounding and the causes of a death; and a further public inquest into the death in circumstances where it is considered necessary. In essence, this mechanism has three purposes: to investigate a suspicious, unexplained, or unusual death in order to determine its exact circumstances and causes; to prevent similar deaths by making reasonable and practicable recommendations[18]; and to reassure the community that the death of one of its members will not be overlooked or ignored by the authorities[19].

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[16] The coroner's office originated in England, and dates back to 1194 A.D. Initially, the coroner performed many duties in addition to investigating unusual deaths, such as dealing with felons who had sought church sanctuary , arresting suspects and witnesses, and appraising and safeguarding property which might be forfeited to the Crown. For a discussion of the historical development of this office, see J.C.E. Wood, "Discovering the Ontario Inquest" (1967) 5 Osgoode Hall L.J. 243 at 244-247; J.D. Morton, Canadian Law of Inquests (Toronto: The Carswell Company Limited, 1980) at 7-16; R.C. Bennett, "The Ontario Coroners' System" (1986-87) 7 Advocates' Q. 53; A. Manson, "Standing in the Public Interest at Coroner's Inquests in Ontario" (1988) 20 Ottawa L. Rev. 637.

[17] Granger, Canadian Coroner Law, supra, note 13 at 3.

[18] For instance, in the B.C. inquest, supra, note 15, the accident took place on a dangerous stretch of the Trans-Canada highway a few kilometers east of Golden. In an effort to prevent similar deaths from occurring, the jury at the inquest recommended that the government upgrade truck-driver education; require mandatory testing of load securement practices; strictly enforce speed limits on that stretch of road; and upgrade that part of the highway: Calgary Herald (29 November 1990) A1,2.

[19] Granger, Canadian Coroner Law, supra, note 13 at 130; Morton, supra, note 16 at 23; Bennett, supra, note 16 at 61-62; F. Moskoff & J. Young, "The Roles of Coroner and Counsel in Coroner's Court" (1987- 88) 30 Cr. L.Q. 190 at 202.

The mechanics of the coroner system vary among the provinces and territories. Indeed, each province and territory has enacted its own legislation governing the coroner system[20]. Thus, determining which deaths must be reported to and investigated by the coroner and when public inquests shall be held into these deaths depends upon the particular legislation in each province[21].

This variety of coroner systems is further complicated by the fact that at least three provinces[22] have replaced the traditional coroner system with the more modern North American medical examiner system, which differs to some extent from the coroner system[23]. In the traditional coroner system, the coroner, who is a medically-trained individual, is responsible for the entire process. The coroner thus conducts the medical investigation into a death and presides over the public inquest. In the medical examiner system, by contrast, the investigation and the inquest stages are separate and are conducted by different individuals: the investigation is conducted by the chief medical examiner, who is a pathologist or other medically-trained individual, and the public inquest (referred to as a "fatality inquiry") is conducted by a legally-trained individual, such as a local judge [24].

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[20] Provincial legislation governing the coroner system is as follows:
British Columbia: Coroners Act, R.S.B.C. 1979, c. 68.
Alberta: Fatality Inquiries Act, R.S.A. 1980, c. F-6.
Saskatchewan: The Coroners Act, R.S.S. 1978, c. C-38.
Manitoba: The Fatality Inquiries Act, R.S.M. 1978, c. F52.
Ontario: Coroners Act, R.S.O. 1980, c. 93.
Quebec: Coroners Act, R.S.Q. 1977, c. C-68.
New Brunswick: Coroners Act, R.S.N.B. 1973, c. C-23.
Nova Scotia: Fatality Inquiries Act, R.S.N.S. 1967, c. 101.
Prince Edward Island: Coroners Act, R.S.P.E.I. 1988, c. C-25.
Newfoundland: The Summary Proceedings Act, S.N. 1979, c. 35.
Yukon Territory: Coroners Act, R.S.Y.T. 1986, c. 35.
Northwest Territories: Coroners Ordinance, R.O.N.W.T. 1974, c. C-16.

[21] In Alberta, for instance, ss.10, 11, and 12 of the Fatality Inquiries Act, ibid., provide, inter alia, that deaths occurring unexplainedly or unexpectedly; as the result of violence, accident or suicide; during or following pregnancy; as the result of improper or negligent treatment; during or following an operative procedure; as the result of poisoning; as the result of disease or injury caused as a direct result of or in the course of employment; while in a peace officer's custody; and while detained in or committed to a jail, detention centre or mental health facility, must be brought to the medical examiner's attention and, pursuant to s.20, shall be investigated. s.34 provides that public inquiries shall be held into these deaths unless it is determined that the death was due entirely to natural causes, that it was not preventable, and that a public inquiry would not serve the public interest.

[22] Alberta, Manitoba, and Nova Scotia.

[23] As well, one province, Ontario, uses a system which is a hybrid of the traditional coroner system and the modern medical examiner system: Bennett, supra, note 16 at 54.

Although the various coroner systems[25] in operation across Canada differ in some respects, they are similar in many other respects. For instance, it is generally accepted that the coroners' inquests held under these systems are not "trials" in any criminal law sense[26]; are not adversarial but are instead inquisitorial in nature[27]; do not name a particular accused; and do not make findings of legal liability or legal responsibility for the death under investigation[28]. As MacCallum sums up the role of the fatality inquest,

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[24] The differences between the two types of systems are discussed in Granger, Canadian Coroner Law, supra, note 13 at 5, 91. See also E.P. MacCallum, "The Law of Sudden Death in Alberta: A Substantive Change" (1980) 18 Alta. L.R. 307.

[25] For the remainder of this chapter, "coroner systems" refers to both coroner systems and medical examiner systems, and "coroner's inquest" is used to refer to both coroners' inquests and fatality inquiries.

[26] There had been debate as to whether a coroner's inquest relates to criminal law matters and thus falls under federal jurisdiction pursuant to s.91(27) of the Constitution Act, 1867, or whether it relates to administration of justice matters and thus falls under provincial jurisdiction pursuant to s.92(14) of that Act. It now seems generally accepted that coroners' inquests are not "trials" in any criminal law sense, and are thus under provincial jurisdiction: Faber v. R., [1976] 2 S.C.R. 9; R. v. McDonald, ex parte Whitelaw, [1969] 3 C.C.C. 4 (B.C.C.A.); Gregoire v. Coroner (Campbellton District) (1988), 226 A.P.R. 255 (N.B.Q.B. T.D.); Head v. Trudel, P.C.J. (1988), 54 Man. R. (2d) 145 (Q.B.), aff'd (1989) 57 Man. R. (2d) 153 (C.A.); Re Michaud and Minister of Justice of New Brunswick (1982), 3 C.C.C. (3d) 325 (N.B.Q.B.).

[27] Indeed, as Granger points out in Canadian Coroner Law, supra, note 13 at 45, the Code provisions relating to coroners' inquests, discussed supra, note 12, are based on the premise that a coroner's inquest can function as an inquisitorial proceeding able to produce a formal accusation of culpable homicide, which must then be followed by the normal criminal process.

[28] With the exception of Quebec, where the legislation permits findings of legal liability. Pursuant to s.30 of the Coroners Act, supra, note 20, the coroner, at the end of the inquest, must draw up a written return which states if he or she believes that a crime has been

> ...the public inquiry can function as a useful and respected source of information; it can help to prevent similar deaths; and it will serve as a reassurance to the community that respect for human life is being observed by those to whom is given the heavy responsibility of custodial care[29].

C. RISKS POSED BY THE FATALITY INQUEST TO AN ACCUSED'S FAIR TRIAL

1. Risks Created By a Lack of Procedural Safeguards

(a) General lack of safeguards

Although the coroner's inquest is not part of the criminal justice process, it has important implications for an accused who faces subsequent criminal proceedings as a result of the evidence given and the findings of fact made at the inquest. In particular, the coroner's inquest creates a significant risk to the fairness of an accused's trial in that it is not governed by many of the procedural safeguards that govern criminal proceedings. In the words of one commentator, "a later criminal trial can be prejudiced by an inquest, in which the pursuit of truth about a death lacks the criminal safeguards of strict procedure and proof beyond a reasonable doubt"[30].

For instance, a person involved or implicated in a death which is the subject of an inquest has traditionally had no right to be heard or to make a defence, since the inquiry is not a legal proceeding in respect of a criminal offence and since there are no "parties", in any legal sense, to an inquest[31]. Likewise, the public traditionally has had no inherent right to attend the

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committed; fully sets out the facts constituting the crime if the case so admits; and names, if possible, the presumed criminal.

[29] Supra, note 24 at 316.

[30] P. Gornall, "Death and the B.C. Coroners Act" (1982) 40 Advocate 19 at 23.

[31] Gregoire v. Coroner (Campbellton District), supra, note 26; Re Michaud and Minister of Justice for New Brunswick, supra, note 26.

inquest[32]. Similarly, a witness testifying at the inquiry has traditionally had no right to be represented by legal counsel or ~~to~~ cross-examine witnesses[33].

This lack of procedural safeguards has been remedied to some extent by various provincial statutes. For instance, provincial statutes now allow for public access to the inquiry[34]. Many provincial statutes also give certain persons the right to attend the fatality inquiry, to be represented by legal counsel, to cross-examine witnesses, and to make arguments and submissions[35]. As well, in addition to these statutory safeguards, some courts have held that coroners' inquests are subject to the principles of natural justice[36].

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[32] Although this has changed in those provinces which expressly require coroners' inquests to be held in public. For instance, in Alberta, s.40.1 of the Fatality Inquiries Act, supra, note 20, provides that all hearings at the fatality inquiry must be open to the public, although the judge at the inquiry has the discretion, in certain specified circumstances, to hold the hearing or any part of it in camera. Granger, in "Crime Inquiries and Coroners Inquests", supra, note 15 at 463-4, suggests that despite such statutory judicial discretion, extremely good reasons will be required to overcome the strong preference for making coroners' inquests open to the public.

[33] In Wolfe v. Robinson (1961), 132 C.C.C. 78 (Ont. C.A.), aff'g (1961), 129 C.C.C. 361(Ont. H.C.), for instance, a major ground of appeal was the coroner's failure to allow the appellant, who was the father of a child who died because of his refusal to allow the child to have a blood transfusion, to cross-examine a witness. The appellant was allowed, however, to be represented by a lawyer and to call witnesses. The court dismissed his appeal on the basis that counsel acting on behalf of an interested party at an inquest has no right to participate at the inquest or to cross-examine witnesses, although he or she may sometimes be allowed to take part in the proceedings as a matter of courtesy extended to him or her by the coroner.

[34] As was discussed above, supra, note 32.

[35] In Alberta, for instance, s.43 of the Fatality Inquiries Act, supra, note 20, provides that the deceased's next of kin, the deceased's personal representative, a beneficiary under the deceased's life insurance policy, and any person who is declared upon application to the judge to be an interested person, may appear at the inquiry; be represented by legal counsel; cross-examine witnesses; and present arguments and submissions.

[36] See, for instance, Gregoire v. Coroner (Campbellton District), supra, note 26, stating that the coroner must at all times protect the civil rights of all persons who may have had some connection with the deceased's death; Re Evans and Milton (1979), 46 C.C.C. (2d) 129 (Ont. C.A.), leave to app. dis. 129*n* (S.C.C.), stating that because the procedure has the trappings of a trial, it is implicit that the legislature intended the rules of natural justice to govern; Re Reid and Wigle (1980), 114 D.L.R. (3d) 669 (Ont. H.C.), stating that the principles of natural justice must govern an inquest; Re Brown and Patterson (1974), 21

(b) Compellability of witnesses at an inquest

One of the most controversial issues concerning this lack of procedural safeguards is whether a witness can be compelled to give evidence at a coroner's inquest when that evidence is likely to be used in an investigation to uncover other admissible evidence against him or her. Although provincial and federal Evidence Acts protect a witness to some extent by providing that although a witness can be compelled to testify, that testimony cannot be used against the witness in a subsequent criminal or civil proceeding[37]; and although some provincial coroners' legislation expressly incorporates this protection[38], the legislation does not prevent the testimony from being used in an investigation to uncover other admissible evidence against the witness[39]. As a result, witnesses who testify at an inquest run the risk that their testimony will be used to uncover other evidence that will be used against them in a subsequent criminal proceeding. The issue of compellability is thus of critical importance to witnesses who may be subsequently charged with a criminal offence.

According to case law, the compellability of a witness at a coroner's inquest depends largely upon whether the witness has been charged with a

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C.C.C. (2d) 373 (Ont. H.C.), stating that the coroner must, when determining standing, exercise his or her discretion judicially.

[37] See, for instance, s.6 of the Alberta Evidence Act, R.S.A. 1980, c. A-21; s.5 of the Canada Evidence Act, R.S.C. 1985, c. C-5. As well, s.13 of the Charter provides that a witness who testifies in any proceedings has the right not to have that testimony used to incriminate himself or herself in any other proceeding.

[38] See, for instance, s.42 of Alberta's Fatality Act, supra, note 20, which provides that a witness at a public inquiry is deemed to object to any question asked him or her if the answer to the question may tend to incriminate him or her, that no answer given by a witness at a public inquiry shall be used or be receivable in evidence against him or her in any trial or other proceeding other than a perjury prosecution, and that when it appears at any stage of the inquiry that a witness is about to give evidence that would tend to incriminate him or her, it is the judge's duty to inform the witness of his or her rights under s.5 of the Canada Evidence Act, ibid.

[39] Morton, supra, note 16 at 96.

criminal offence arising from the death which is the subject of the inquest. If the witness has been so charged, he or she can not be compelled to testify at a coroner's inquest into that same death[40]. However, if the witness has not been charged with a criminal offence arising from the death under investigation, he or she can be compelled to testify at the inquest.

For instance, in R. v. McDonald, ex parte Whitelaw[41], an inquest was held into the death of a pedestrian who had been struck and killed by a car. The driver of the car, who had not yet been charged with a criminal offence, argued that he was not compellable as a witness at the inquest because he might still be charged with a criminal offence. The British Columbia Court of Appeal disagreed and held that he could indeed be compelled to testify at the inquest, since a person who has not been charged with a crime is in no different position from any other witness who is summoned to an inquest and who can be compelled to testify at the inquest pursuant to provincial legislation[42].

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[40] Indeed, provincial legislation requiring a witness to testify at an inquest, where the witness has been charged with a criminal offence arising from the death which is the subject of the inquest, is ultra vires the province: it invades Parliament's exclusive jurisdiction over criminal law matters by changing existing criminal law rules protecting a person charged with a crime from being compelled to testify against himself or herself: Batary v. A.G. for Saskatchewan, [1965] S.C.R. 465. See also R. v. Johansen, [1976] 2 W.W.R. 113 (Alta. S.C.A.D.), aff'g (1974), 21 C.C.C. (2d) 310 (Alta. S.C. T.D.); Re Maddess' Application for Prohibition (1967), 59 W.W.R. 698 (B.C.S.C.).

[41] Supra, note 26.

[42] The court went on to hold that because provincial inquest legislation is in pith and substance legislation relating to the administration of justice and thus falling under provincial jurisdiction, and because a witness who has not been charged with a criminal offence is not entitled to any of the criminal law protections afforded accused persons, provincial legislation compelling a witness to testify is valid legislation and does not breach the federal government's exclusive jurisdiction over criminal law matters. See also Di Iorio v. Warden, Jail of Montreal (1976), 73 D.L.R. (3d) 491 (S.C.C.), dealing with the compellability of witnesses at a public inquiry other than a coroner's inquest; Faber v. R., supra, note 26. But see R. v. Gauthier (1975), 34 C.C.C. (2d) 266 (Que. C.A.), where the court held that provincial legislation requiring that a witness answer questions at an inquest is ultra vires the province because it attempts to regulate the admissibility of evidence given during a criminal proceeding.

Further, it has been held that the protection against self-incrimination set out in s.11(c) of the Canadian Charter of Rights and Freedoms[43] does not apply to persons who have not yet been charged with a criminal offence but who are compelled to testify at a coroner's inquest. In Re Michaud and Minister of Justice of New Brunswick[44], the applicant was charged with murdering his wife. Subsequent to his discharge at the preliminary inquiry, he was served with a summons to attend and give evidence at an inquest into his wife's death. He applied for an order quashing the summons on the basis that it breached s.11(c) of the Charter[45]. The court dismissed his application on the ground that the Charter does not affect the general rule that persons who are not charged with a criminal offence can be compelled to testify at a coroner's inquest[46].

2. Risks Created By Prejudicial Pre-Trial Publicity

The fairness of an accused's trial can be seriously threatened by pre-trial publicity arising from a coroner's inquest. Coroners' inquests are often the subject of great public and media attention. As a result, the evidence given and the findings of fact made at an inquest may be highly publicized prior to the start of a criminal trial relating to the same death. This publicity may affect the fairness of an accused's subsequent criminal trial, particularly when the accused has been compelled to testify as a witness at the inquest[47] . As one commentator puts it, such publicity "...allows for the destruction of an individual's reputation prior to any finding of guilt and in some cases prejudices the possibility of a fair trial thereafter"[48] .

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[43] s.11(c) provides that a person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence.

[44] Supra, note 26.

[45] He also argued that this breached s.11(d) of the Charter, setting out the right to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal, and s.12 of the Charter, setting out the right not to be subjected to any cruel and unusual punishment. The court dismissed both of this arguments.

[46] See also Richard v. Falardeau (1985), 48 C.R. (3d) 243 (Que. S.C.). As well, at least one case has held that other provisions of the Charter do not apply to coroners' inquests. In Edmonton Journal v. A.G. of Canada, [1984] 1 W.W.R. 599 (Alta. Q.B.), aff'd [1985] 4 W.W.R. 575 (Alta. C.A.), leave to app. dis. 17 C.R.R. 100*n* (S.C.C.), the judge decided to receive the deceased's records in private, pursuant to mental health legislation. The media applied for an order that this breached s.2 of the Charter. The court dismissed the application on the basis that a fatality inquiry is not a court proceeding and that s.2(b) of the Charter is not applicable to a fatality inquiry.

The risks created by pre-trial publicity arising from an inquest are compounded by the fact that a broader variety of evidence is admissible at an inquest than at a criminal trial. Thus, evidence which would not necessarily be admissible at trial, such as hearsay evidence or evidence relating to an accused's criminal record, may well be admissible at the coroner's inquest[49]. If this evidence is widely publicized, potential jurors will be exposed to highly prejudicial information prior to the start of the trial, even though they would not be exposed to this information at the trial itself.

Despite these significant risks to an accused's fair trial, however, there are no restrictions on the reporting of information arising from an inquest. Although the Criminal Code contains provisions allowing for publication bans on information arising from criminal proceedings such as preliminary inquiries and bail applications, provincial legislation governing coroners' inquests contains no similar provisions[50]. Thus, persons who preside over coroners' inquests have no authority to prevent the publication of information disclosed at an inquest, even in situations where such publication poses a clear and immediate danger to the fairness of an accused's subsequent criminal trial[51]. As a result, it has been suggested that the law be changed so that a person who is charged or who is likely to be charged with a criminal offence should be entitled to request and receive an order prohibiting the publication of the proceedings at the inquest, with the order to remain in force until the criminal proceedings have been completely disposed of[52].

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[47] For instance, in a five-day Alberta fatality inquiry into the October, 1989 shooting death of a passenger in a vehicle by an R.C.M.P. officer, testimony from the inquiry revealed that the officer had been convicted four years previously of the careless use of a firearm and of assault, and had been involved in domestic fights with his wife which had resulted in him physically assaulting her: Calgary Herald (22 November 1990) A1. Had the officer been subsequently charged with a criminal offence arising from this shooting death, this information regarding his criminal record would have already reached the general public and could well have affected the impartiality and fairness of his trial.

[48] Morton, supra, note 16 at 99.

[49] In Alberta, for instance, s.40 of the Fatality Inquiries Act, supra, note 20 provides that a judge at a hearing may admit in evidence any oral testimony or any document or other thing that is relevant to the purposes of the inquiry provided that the evidence is not vexatious, unimportant, or unnecessary for the purposes of the inquiry.

It should be noted that the dangers created by pre-trial publicity are not restricted solely to coroners' inquests but extend to other types of public inquiries as well[53]. For instance, Royal Commissions are a type of public inquiry which are often highly publicized[54], and which may thus create publicity endangering the fairness of an accused's subsequent criminal trial. If legislation governing these public inquiries does not specifically provide for publication bans, persons presiding over these inquiries may be unable to ban the publication of information arising from them. As a result, it has been suggested that the person presiding over a public inquiry should have express discretionary powers to prohibit the publication of the proceedings[55].

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[50] Although at one time, there was a common law prohibition against the publication of evidence arising from an inquest in cases where a person might be committed on a murder or manslaughter charge: Morton, supra, note 16 at 98.

[51] See, for instance, Canadian Newspapers Co. v. Isaac (Coroner) (1988), 27 O.A.C. 229 (Ont. Div. Ct.), where the court stated that the coroner has no right to make a publication ban on evidence that has been disclosed at the inquest.

[52] Granger, Canadian Coroner Law, supra, note 13 at 337. Morton, supra, note 16 at 128-129, suggests that publication should be banned in many cases to protect the reputations of individuals and institutions. These commentators also suggest that express discretionary powers should be given to persons conducting the inquest to prohibit publication of the proceeding.

[53] In Re Orysiuk and R. (1977), 37 C.C.C. (2d) 445 (Alta. S.C. A.D.), for instance, the court stated that publicity is an inherent and important aspect of a public inquiry and that there have been complaints about the adverse effects of publicity surrounding public inquiries and commissions dating as far back as the 16th century.

[54] For instance, the Ontario Royal Commission into the deaths of several infants at the Toronto Hospital for Sick Children (referred to as the "Grange Commission"), which was appointed after one of the prime suspects, nurse Susan Nelles, had been discharged of four counts of murder at her preliminary inquiry, was very widely publicized. For a discussion of this Royal Commission and publicity issues arising therefrom, see D.J. Baum, "Public Inquiries, Access and Publication: Lessons from Grange", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 405.

In conclusion, the lack of statutory means available to control the publicity arising from a coroner's inquiry (and indeed from other public inquiries) is unacceptable. In light of the fact that such publicity can have very damaging effects upon an accused's subsequent criminal trial, a person who testifies at a coroner's inquest and who is likely to be subsequently charged with a criminal offence should be able to request a publication ban on prejudicial information arising from the inquest. The judge or coroner presiding over the inquest should have discretion as to whether or not to order this ban, and should exercise this discretion according to the nature of the information under consideration. For instance, some types of information, such as a witness's confession or criminal record, are so prejudicial as to clearly require that their publication be banned.

This publication ban should last for a limited time period running from the time of the inquest until the accused's subsequent criminal trial has ended or the accused has been discharged at the preliminary inquiry. As well, since coroners' inquests do not automatically result in criminal proceedings, provision should be made for allowing the press to apply to have the ban removed once a specified time period, such as six months or a year, has passed after the end of the inquest in situations where criminal proceedings did not follow the inquest.

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[55] Law Reform Commission of Canada, Working Paper 17: Commission of Inquiry (Ottawa: Minister of Supply & Services Canada, 1977).

IV. PRELIMINARY INQUIRIES

A. INTRODUCTION

A preliminary inquiry is the second major type of pre-trial proceeding that can pose a significant risk to the impartiality of an accused's subsequent criminal trial. Indeed, evidence given at a preliminary inquiry can be highly prejudicial to an accused's criminal trial. The prejudicial effects of such information are further compounded by the fact that a preliminary inquiry, like a coroner's inquest, may receive much public and media attention.

Unlike a coroner's inquest, however, statutory provisions specifically set out restrictions on the publication of information arising from a preliminary inquiry. In particular, several Criminal Code provisions set out publication bans designed to prevent the publication of information which may be highly prejudicial to an accused's subsequent criminal trial.

In order to understand the risks posed by a preliminary inquiry to an accused's fair trial, two topics will be considered. First, the nature of a preliminary inquiry will be briefly discussed. Second, the risks posed to an accused's fair trial by publicity arising from a preliminary inquiry, and the statutory provisions available to deal with such publicity, will be examined.

B. NATURE OF THE PRELIMINARY INQUIRY

The preliminary inquiry is part of the criminal trial process, and is governed by provisions set out under Part XVIII of the Code[56]. The main purpose of a preliminary inquiry is to determine whether there is sufficient evidence to warrant putting an accused charged with an indictable criminal offence on trial[57]. Indeed, some courts have asserted that this a preliminary inquiry's sole purpose[58].

Other courts and commentators have asserted that a preliminary inquiry serves additional purposes beyond simply determining the sufficiency of evidence. It has been argued that a preliminary inquiry serves as a type of discovery process for the accused, enabling the accused to ascertain the nature of the case being put forth against him or her by the Crown; allows the accused to prove his or her innocence well in advance of the trial itself; protects the accused from a needless exposure to a public trial where there is insufficient evidence to warrant the continuation of the criminal process; ties down the evidence of Crown witnesses; perpetuates testimony; satisfies community pressures; helps contribute to the speedy, logical and rational progression of the criminal trial as a whole; and acts as a "test run" for the Crown to see if it will be worthwhile to go to trial[59].

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[56] As with the coroner's inquest, the preliminary inquiry has a very long history, and dates back to 1327 A.D. For a discussion of its historical development, see S.E. Halyk, "The Preliminary Inquiry in Canada" (1967-68) 10 Crim. L.Q. 181; R. D. Holmes, "The Scope of Judicial Review of Preliminary Hearings and Committals for Trial" (1982) 16 U.B.C. L. Rev. 257.

[57] As stated by many commentators and courts: see N.J. Freedman, "Fair Trial--Freedom of the Press" (1964) 3 Osgoode Hall L.J. 52 at 72; Holmes, ibid. at 262; Patterson v. R., [1970] S.C.R. 409; R. v. Mills (1986), 67 N.R. 241 (S.C.C.); R. v. J.C. (1986), 72 A.R. 119 (Youth Ct.).

[58] See, for example, Caccamo v. R. (1975), 21 C.C.C. (2d) 257 (S.C.C.), where de Grandpre, J., speaking for the majority, stated that it is settled law that a preliminary inquiry's sole purpose is to satisfy the judge that there is sufficient evidence to put the accused on trial.

While the preliminary inquiry is thus an important part of the criminal trial process, it is not a trial. Indeed, the court conducting the preliminary inquiry is not a "court of competent jurisdiction" within the meaning of s.24 of the Charter. In R. v. Mills[60], for instance, the accused made an application at the preliminary inquiry for a stay of proceedings based on abuse of process and on a breach of s.11(b) of the Charter, which guarantees trial within a reasonable time. The majority of the Supreme Court of Canada held that the magistrate at the preliminary inquiry has no jurisdiction to acquit, convict, impose a penalty, or give a remedy, and is thus not a court of competent jurisdiction under s.24(1) of the Charter.

C. PREJUDICIAL PRE-TRIAL PUBLICITY ARISING FROM A PRELIMINARY INQUIRY

As with a coroner's inquest, a preliminary inquiry poses a risk to the fairness of an accused's subsequent trial. This risk is created by the pre-trial publication of the evidence given and the information revealed at the preliminary inquiry.

Direct and indirect prior restraints are available to deal with this risk to an accused's fair trial[61]. Pursuant to s.539 of the Code, the justice holding the inquiry may, prior to the start of the inquiry, make an order directing that the evidence taken at the inquiry[62] shall not be published or broadcast until such time as the accused is either discharged at the inquiry or the accused's criminal trial has ended[63]. The ordering of this publication ban is at the judge's discretion if it is requested by the Crown, but is mandatory if it is requested by the accused[64].

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[59] Cases and commentators setting out some of these rationales include Skogman v. R., [1984] 2 S.C.R. 93; Falovitch v. Lessard, J.S.P. (1979), 9 C.R. (3d) 197 (Que. S.C.); R. v. Schreder (1987), 59 C.R. (3d) 183 (N.W.T.S.C.); Holmes, supra, note 56; Halyk, supra, note 56.

[60] Supra, note 57.

[61] This is in sharp contrast to the American situation. In the United States, there are almost no restraints upon what may be published concerning pre-trial proceedings: see Chapter 6, "The American Experience". In England, by contrast, restrictions do exist as to what may be published about a preliminary inquiry: see Chapter 7, "The English Experience".

s.542 of the Code provides for a publication ban on the reporting of an accused's confession or admission which is given in evidence at the preliminary inquiry. Pursuant to this section, everyone who publishes or broadcasts either the fact that a confession or admission was given in evidence at the inquiry or the contents or nature of such an admission or confession is guilty of a summary conviction offence. This no longer applies once the accused has been discharged at the inquiry or the accused's trial has ended[65].

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[62] There is some question as to whether the prohibited information includes only the actual evidence given at the inquiry, or whether it includes information about the case which is gathered from other sources prior to the preliminary inquiry and which later becomes evidence at the inquiry. In R. v. Nelles (1982) (Ont. Prov. Ct.) [unreported], as discussed in Lepofsky, supra, note 2 at 70-72, the court mentioned in passing that it was highly doubtful that the printing of material subsequently becoming evidence could be justified on the basis that it had been derived from other sources prior to the imposition of a publication ban.

[63] However, if the ban is made during the inquiry rather than at the start of the inquiry, the justice may lift the ban prior to the accused's discharge or the completion of his or her trial. In R. v. Harrison (1984), 14 C.C.C. (3d) 549 (Que. Sess. Ct.), a publication ban was imposed at the accused's request after 44 days of testimony at the inquiry. Immediately after the ban was made, the accused held a press conference to discuss the political aspects of the inquiry. The court lifted the publication ban on the basis that allowing the ban to stand would cause irremediable harm to the administration of justice, since it would leave the public with the impression that the courts could be manipulated. The court stated that if the accused suffered any prejudice at his trial, he would have only himself to blame.

[64] The power to order a publication ban is strictly limited to the specific terms of this provision. In R. v. Stupp (1982), 2 C.C.C. (3d) 111 (Ont. H.C.), the court dismissed an accused's request for a permanent ban on the publication of his application to quash a sub poena. This ban was to prohibit the publication of any arguments, submissions, evidence, or rulings in the matter, and to prohibit the publication of the reasons in any law report. The court refused to make this ban on the basis that it had no authority to do so pursuant to s.539 (then s.467).

Breach of these restraints is punishable under the Code. As was discussed above, publication of an accused's confession or admission tendered in evidence at the inquiry is a summary conviction offence. Likewise, publication in contravention of a non-publication order is also made a summary conviction offence pursuant to s.539(3) of the Code. For instance, in R. v. CJCD Radio Ltd.[66], the trial judge ordered a publication ban at the accused's preliminary inquiry. A radio station subsequently aired news reports dealing with the evidence given at the preliminary inquiry. The radio station was convicted of breaching the publication ban and was fined $1,200. In arriving at this decision, the court stated that an aggravating factor was that there were only two local AM stations in the area. This meant that the attention of a relatively large listening area would be caught by the broadcast's sensationalist elements, which thus created a risk of serious compromise to the administration of justice and to the accused's right to a fair trial.

In addition to these direct restraints upon the publication of information arising from a preliminary inquiry, the Code also provides for an indirect restraint in the form of a closure order. Pursuant to s.537(1)(h) of the Code, a justice may exclude all persons, with the exception of the Crown, the accused, and their counsel, from the courtroom in which the inquiry is being held in situations where it appears that the ends of justice will be best served by so doing. Such a closure would have the indirect effect of preventing the publication of the evidence given at the inquiry. However, this type of exclusion order is likely to be ordered only in rare cases, since "...the public in general has a right to be present in the court-rooms of our land and to know what transpires there"[67].

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[65] These restraints on the publication of evidence given at a preliminary inquiry were made part of Canadian law only in the late 1960's: S.M. Robertson, Courts and the Media (Toronto: Butterworth & Co. (Canada) Ltd., 1981) at 200. Prior to that time, the press was free to report on the evidence given at the inquiry in much the same manner as it is still free to report on the evidence given at a coroner's inquest: see, for instance, R. v. Thibodeau (1955) 23 C.R. 285 (N.B.S.C. Q.B.D.). This lack of controls on such reporting was criticized by many commentators: see, for instance, Freedman, supra, note 57; R.C. Stevenson, "Criminal Law--Contempt of Court" (1956) 34 Can. Bar Rev. 206; G.A. Hardy, "Criminal Law--Preliminary Inquiry--section 452A Amendment to Criminal Code of Canada" (1970) 9 Alta. L. Rev. 147.

[66] [1986] 6 W.W.R. 435 (N.W.T. Territ. Ct.).

V. CHARTER IMPLICATIONS OF PRIOR RESTRAINTS

A. INTRODUCTION

Prior restraints are intended to control prejudicial pre-trial publicity about an accused and his or her involvement in the criminal justice system. However, while these prior restraints may protect an accused's right to a fair trial, they may also infringe freedom of expression by preventing the publication and dissemination of information to the public. Prior restraints may thus breach s. 2(b) of the Canadian Charter of Rights and Freedoms.

When discussing the Charter implications of prior restraints, it is necessary to distinguish between direct and indirect prior restraints. Direct prior restraints, which take the form of publication bans, have a direct and immediate impact upon speech and expression. Indirect prior restraints, which take the form of closure orders, have a less direct impact upon speech and expression, since they operate primarily to exclude the public from a court proceeding. However, by preventing public and media attendance at the proceeding, closure orders also prevent public discussion of what transpires at the proceeding: since the public and the media are not able to attend the proceeding, they will not know what occurred at the proceeding and will thus be unable to report on and discuss the proceeding.

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[67] R. v. Sayegh (No. 1) (1982), 66 C.C.C. (2d) 430 at 431 (Ont. Prov. Ct.). It should be noted that the court cannot pick and choose which members of the public will remain and which members of the public will be excluded: R. v. Sayegh (No. 2) (1982), 66 C.C.C. (2d) 432 (Ont. Prov. Ct.). In this case, the court, after issuing a non-publication ban and after being informed by two members of the American media that they would not comply with this order, made an order excluding the public from the inquiry. Members of the Canadian media then applied to have this order varied so that only the American media would be excluded and the Canadian media, who were willing to abide by the non-publication order, would be allowed to remain. The court dismissed this application on the basis that it could not pick and choose who would be allowed to attend the inquiry, and stated that either everyone would attend or no one would attend the inquiry.

In discussing the impact of the Charter upon the use of prior restraints, each of these two types of prior restraints will be considered. First, freedom of expression in relation to direct restraints such as publication bans will be examined. Second, freedom of expression in relation to indirect restraints such as closure orders will be discussed.

B. FREEDOM OF EXPRESSION AND DIRECT PRIOR RESTRAINTS

There has been debate as to whether a direct prior restraint, such as a publication ban on information arising from a change of venue hearing or on an accused's confession given in evidence at a preliminary inquiry, violates freedom of expression as guaranteed under s.2(b) of the Charter. Some commentators have asserted that publication bans do indeed breach s.2(b) of the Charter[68], since they prevent the dissemination of information about court proceedings to the public. This lack of information dissemination results in the curtailment of public discussion about the particular events taking place in the courtroom and about the administration of justice as a whole. In turn, this curtailment of public discussion poses a serious risk to the goals which freedom of expression seeks to achieve.

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[68] See, for instance, Lepofsky, supra, note 2 at 257, where he states that prior restraints breach the Charter because they are an overt denial of press freedom to publish accurate accounts of public events occurring in an open courtroom.

These goals fall into two categories. First, it is argued that freedom of expression is necessary to achieve important societal and public goals. For instance, it is argued that freedom of expression promotes the proper administration of justice by ensuring that criminal proceedings are held up to the light of public scrutiny; promotes public confidence in the judicial system by ensuring that the public can freely discuss and consider the judicial system; and allows the public to engage in informed debates on reforms to the judicial system[69]. As well, it is asserted that freedom of expression is essential to the proper functioning of a democratic system, since the public must be fully informed of and must be able to openly discuss important matters relating to government; promotes the betterment of society by facilitating the pursuit of truth and justice; and ensures that individuals retain and exercise a basic human attribute: the ability to think rationally and communicate these thoughts to others[70].

Second, it is argued that freedom of expression promotes important goals in relation to an individual accused involved in the criminal justice system.

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[69] As stated by Lepofsky, supra, note 2 at 47-9; M.D. Lepofsky, "Section 2(b) of the Charter and Media Coverage of Criminal Court Proceedings" (1983), 34 C.R. (3d) 63 at 64; A.M. Linden, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 301 at 302; J. Cameron, "Comment: The Constitutional Domestication of our Courts--Openness and Publicity in Judicial Proceedings under the Charter", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 331 at 337-341; Law Reform Commission of Canada, Working Paper 56: Public and Media Access to the Criminal Process (Ottawa: Law Reform Commission of Canada, 1987) at 14-17.

[70] Lepofsky, Open Justice, supra, note 2 at 217; Law Reform Commission of Canada, ibid. at 5-9; R. v. Keegstra (Dec. 13, 1990) (S.C.C.) [unreported]. As stated by Cory, J., in Edmonton Journal v. A.G. for Alberta, [1989] 2 S.C.R. 1326 at 1336, "it is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions".

In particular, it is asserted that publicity is essential to an accused's enjoyment of his right to a fair trial because it ensures the government will have to act fairly and impartially in its handling of the accused's case[71].

Since publication bans prevent the publication and dissemination of information to the public, they curtail a full and informed public discussion of matters relating to the administration of justice. They thus prevent the fulfillment of those goals sought to be achieved by freedom of expression, and infringe s. 2(b) of the Charter. As a result, it is argued that prior restraints should be permitted only in extreme circumstances where publicity clearly threatens a trial's fairness and where there are no other available ways to protect the trial's fairness[72]. Commentators have suggested that a judge, when deciding whether the circumstances in a particular case warrant the imposition of a prior restraint, should be required to hold a special hearing to determine the permissibility of the restraint, with the media and the public having a reasonable opportunity to present arguments at this hearing[73].

While commentators have argued that prior restraints should be struck down as infringing freedom of expression under s.2(b) of the Charter, Canadian courts have not followed suit. Canadian courts have approached this issue primarily by assessing the impact of freedom of expression and publicity upon an individual accused's rights and interests. In other words, Canadian courts have generally not considered prior restraints and freedom of expression in relation to the broader societal goals discussed above[74].

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[71] Cameron, supra, note 69 at 338.

[72] See, for instance, Lepofsky, Open Justice, supra, note 2 at 320; Cameron, ibid. at 345; Linden, supra, note 69 at 323.

[73] Lepofsky, ibid. at 260; Lepofsky, "Section 2(b) of the Charter", supra, note 69 at 72-73.

[74] One exception to this general rule is found in R. v. Robinson (1983), 5 C.C.C. (3d) 230 (Ont. H.C.), where the court stated, in dismissing the accused's application for a publication ban on information identifying the accused, that the essential quality of the criminal process in a democracy is the absence of secrecy; that our judicial process is characterized

Although Canadian courts have recognized the role that publicity and freedom of expression play in ensuring that justice is done and that an accused's trial is properly and impartially conducted[75], the courts have generally upheld the constitutional validity of publication bans[76]. Some courts have upheld publication bans on the basis that they do not infringe but only defer freedom of speech. For instance, in R. v. Doyle[77], four co-accused had been convicted of conspiracy to commit murder. On appeal, new trials were ordered. At the start of one accused's new trial, the court ordered a publication ban on the evidence given at that trial on the grounds that the evidence could prejudice the co-accuseds' trial, which was to start a few days later. The ban was to last until the completion of the co-accuseds' trial. The court stated that the ban did not breach s.2 of the Charter, since it only deferred but did not permanently prohibit publication.

Other courts have upheld publication bans on the basis that while they do infringe freedom of expression, they are reasonable and justifiable

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by public access; and that openness prevents the abuse of the judicial system and fosters public confidence in the fairness and integrity of the justice system. This general judicial failure to consider the broader societal and public goals served by freedom of expression has been criticized: see, for instance, Cameron, supra, note 69 at 332, 336-7, 341.

[75] In Re R. and Several Unnamed Persons (1983), 8 C.C.C. (3d) 528 at 531 (Ont. H.C.), for example, O'Brien, J., stated that it is a matter of great public importance that "...the light of public knowledge should illuminate our court proceedings" and that publicity is "the soul of justice". Likewise, in R. v. Robinson, ibid. at 233, Boland, J., stated that "the press is a positive influence in assuring fair trial".

[76] However, it is interesting to note that publication bans on various civil proceedings have have been held unconstitutional. In Edmonton Journal v. A.G. for Alberta, supra, note 70, for instance, the majority of the Supreme Court of Canada struck down provisions in Alberta's Judicature Act , which severely limited what information could be published concerning civil matters, on the basis that they violated s.2(b) of the Charter and could not be saved under s.1 of the Charter as being reasonable and justifiable.

[77] (1988), 86 N.S.R. (2d) 26 (S.C.T.D.). See also R. v. Barrow , supra, note 9, upholding a ban on the publication of certain evidence from the accused's first trial pending the accused's new trial; Re R. and Lortie (1985), 21 C.C.C. (3d) 436 (Que. C.A.), upholding a ban on the broadcast of certain videotapes adduced as evidence at the accused's first trial pending disposition of the accused's appeal; A.G. for Manitoba v. Group Quebecor Inc., [1987] 5 W.W.R. 270 (Man. C.A.), stating that a delay of publication does not breach free speech.

infringements, and are thus saved by s.1 of the Charter. For instance, in Canadian Newspapers Co. v. Canada (A.G.)[78], the Supreme Court of Canada upheld the validity of the Criminal Code's mandatory publication ban on a complainant's name in certain sexual offence cases[79]. In arriving at this decision, the Court stated that while freedom of the media is an important and essential attribute of a free and democratic society, and while this publication ban did indeed violate s.2(b), the ban was reasonable and justifiable, and amounted to only a minimal imposition on the media's rights. The ban was thus saved by s.1 of the Charter. The Court emphasized that the objectives of the publication ban--the suppression of crime and the improvement of the administration of justice--were sufficiently important to warrant overriding a constitutional right.

Likewise, in Re Global Communications Ltd. and A.G. for Canada[80] , an extradition judge imposed a publication ban on evidence and submissions tendered at the bail hearing of Cathy Smith, who was sought in the United States on charges of murdering comedian John Belushi. This ban was to remain in effect until the accused was either discharged or her trial in the United States was concluded. The media brought an application to set aside this order on the basis that it infringed s.2(b) of the Charter. This application was dismissed first by the Ontario High Court[81], and then by the Ontario Court of Appeal, on the basis that while the order did infringe s.2(b) of the Charter, it was nonetheless a reasonable and justifiable limitation on freedom of expression. The Court of Appeal emphasized that evidence given at a bail hearing can include evidence grossly prejudicial to an accused's subsequent criminal trial, such as references to other outstanding charges, past offences not charged, and unchallenged statements as to reputation and fact. In the words of the court,

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[78] (1988), 38 C.R.R. 72 (S.C.C.).

[79] At the time of the judgment, this ban was set out in s.442(3) of the Code (now s.486(3)).

[80] (1984), 10 C.C.C. (3d) 97 (Ont. C.A.), aff'g (1983), 5 C.C.C. (3d) 346 (Ont. H.C.).

[81] Although Mr. Justice Linden later questioned whether he should have taken a greater account of the procedural safeguards available in the United States to guarantee a fair trial. As he stated, "it is possible that publicity could have been permitted here and reliance placed upon the machinery of justice in the U.S. to see that the rights of the accused to a fair trial were protected": Linden, supra, note 69 at 319.

> The right to trial is a fragile right. It is quite capable of being shattered by the kind of publicity that can attend a bail hearing and, once shattered, it may, like Humpty Dumpty, be quite impossible to put back together again[82].

Similarly, in R. v. Banville[83], the court had imposed a publication ban on evidence arising from a preliminary inquiry held in New Brunswick. The accused, an American reporter attending the inquiry, then filed a story which included some of the banned information. He was convicted of breaching the non-publication order. His conviction was upheld on appeal on the basis that the Charter did not apply because it had not been in application at the time the offence was committed. The court went on to state that even if the Charter did apply, the ban was justified under s.1, since it did not prevent an open trial and since it only deferred the publication for a short time. Thus, the ban did not infringe the public's right to know. The court did, however, reduce the accused's sentence from a $200 fine to an absolute discharge[84].

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[82] Supra, note 80 at 113. Indeed, the Law Reform Commission of Canada has emphasized that publicity surrounding a bail application poses particular problems, since evidence that is relevant and admissible to the question of bail may be irrelevant and inadmissible in a subsequent trial on the offence charged: supra, note 69 at 28.

[83] (1983), 3 C.C.C. (3d) 312 (N.B.Q.B.), aff'g (1982), 69 C.C.C. (2d) 520 (N.B. Prov. Ct.).

[84] See also R. v. Barrow, supra, note 9, where the court stated that even if the ban had breached s.2 of the Charter, it would have been saved by s.1; Re Southam Inc. and R. (No. 2), supra, note 8, where the court upheld a publication ban in relation to a change of venue application on the basis that a temporary suspension of freedom of the press could be justified. A publication ban on certain aspects of juvenile proceedings, which was authorized under the former Juvenile Delinquents Act, was also upheld as being a breach of freedom of the press which was saved by s.1 of the Charter: R. v. T.R. (1984), 52 A.R.

A common theme running through all of these judgments, regardless of whether the courts find that publication bans do not infringe freedom of expression or whether they find that these bans are reasonable and justifiable infringements of freedom of expression, is a strong judicial belief that an accused's right to a fair trial must take precedence over freedom of expression. Indeed, many courts have emphatically stated that freedom of expression must give way to an accused's right to a fair trial when the two rights come into conflict. As Smith, J. stated in Re Southam Inc. and R. (No. 2)[85] ,

> It could not have been in the contemplation of the new Fathers of Confederation that the rights of an accused person should be whittled down in the name of a general concept of the freedom of expression or freedom of the press. A weighing process must always take place in each individual case...the right to a fair trial being paramount...

This same belief was expressed in a slightly different way by Boilard, J. in Southam Inc. v. Brassard[86], who stated that

> A balance must always be struck between the right of the media to disseminate news and the right of an accused to a fair trial. As soon as this balance is upset or risks being upset, the right to to a fair trial must take precedence over the freedom of the press[87] .

While Canadian courts have generally upheld publication bans designed to protect the accused's right to a fair trial when it comes into conflict with freedom of expression, the courts will not uphold publication bans which are

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149 (Q.B.), although this same provision was struck down in Re Southam Inc. and R. (No. 1) (1983), 3 C.C.C. (3d) 515 (Ont. C.A.).

[85] Ibid. at 269.

[86] (1987), 38 C.C.C. (3d) 74 at 87 (Que. S.C.).

[87] For other judicial statements that the right to a fair trial takes precedence over freedom of expression, see R. v. Banville, supra, note 83; R. v. Hawken, [1944] 1 W.W.R. 408 (B.C. S.C.); Re Editions Maclean and Fulford (1965), 46 C.R. 185 (Que. Q.B.); R. v. Doyle, supra, note 76; R. v. Barrow, supra, note 9; R. v. Squires (1989), 69 C.R. (3d) 337 (Ont. Dist. Ct.), aff'g (1986), 50 C.R. (3d) 320 (Ont. Prov. Ct.); A.G. of Alberta v. Interwest Publications Ltd. (1990), 74 Alta. L.R. (2d) 372 (Q.B.).

permanent or which are overly inclusive in scope. Such permanent or far-reaching publication bans are considered tantamount to censorship, and are thus too great an infringement upon freedom of expression[88].

As well, Canadian courts have been reluctant to uphold publication bans which are simply intended to save one or more parties in a criminal matter embarrassment or shame. In Re R. and Several Unnamed Persons[89] , the accused, who had been charged with gross indecency in a highly publicized case, sought a publication ban on their names on the ground that such publication would deprive them of their rights to a fair trial. The court dismissed their application on the basis that the public interest in this matter far outweighed the risk of possible embarrassment to the accused[90] .

C. FREEDOM OF EXPRESSION AND INDIRECT PRIOR RESTRAINTS

Indirect prior restraints, such as orders closing a courtroom to the public and preventing the public from having access to a court proceeding, raise many of the same issues as do publication bans. While closure orders are a more indirect form of prior restraint than are publication bans, they may arguably infringe freedom of expression as guaranteed under the Charter by breaching the public's right of access to court proceedings.

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[88] As stated in R. v. Sophonow (No. 2) (1983), 6 C.C.C. (3d) 396 (Man. C.A.); Re Church of Scientology of Toronto, supra, note 6.

[89] Supra, note 75.

[90] See also R. v. Dacey (1988), 84 N.S.R. (2d) 97 (Prov. Ct.), dismissing the accused's application in a sexual assault case for a publication ban on information that might identify him; Southam Inc. v. Brassard, supra, note 86, quashing that part of a publication ban which prohibited the publication of the names and addresses of accused charged with various offences; Re R. and Unnamed Person (1985), 22 C.C.C. (3d) 284 (Ont. C.A.), setting aside a lower court order prohibiting the publication of the accused's identity where she had been charged with infanticide and with neglecting to obtain assistance in childbirth.

Although the right of access to court proceedings is not itself specifically guaranteed under the Charter, many courts and commentators have considered the right of access to be an integral part of freedom of expression[91]. It has been argued that freedom of expression means more than simply the freedom to disseminate information, for the ability to disseminate information is dependent upon being allowed to gather the information that is to be disseminated. Therefore, freedom of expression arguably includes the right to gather information as well to disseminate information[92].

Closure orders prevent the gathering of information about a court proceeding by preventing public and media access to that proceeding. They may thus violate freedom of expression. Further, closure orders may also pose a serious risk to the goals which this right of access to court proceedings seeks to promote. These goals are very similar to those promoted by freedom of expression.

For instance, access to open court proceedings promotes significant societal and public goals. It ensures the proper administration of justice by allowing the public to monitor criminal proceedings; promotes public confidence in and respect for the judicial system by ensuring that justice is not carried out in secret; serves as an outlet for community concern and emotion about a particular criminal matter; allows the public to engage in informed debates on reforms to the justice system, based on the public's own observation of court proceedings; and checks government wrongdoing and prevents abuses of office or power[93]. As well, it is asserted that access to open court proceedings is an integral part of the proper functioning of a democratic system, since openness contributes to the public's ability and freedom to express itself about any government behaviour or action, and thus advances democratic aims[94] .

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[91] For instance, in Re Southam Inc. and the Queen (No. 1), supra, note 84, the court stated that free access to the courts is an integral and implicit part of the guarantee of free expression.

[92] As stated in R. v. Squires, supra, note 87. In R. v. Rideout (1987), 67 Nfld. & P.E.I.R. 91 (Nfld. S.C.T.D.), the court stated that freedom of expression in its broadest sense includes the right to gather such information as may be necessary to give an intelligent and responsible expression of opinion.

Access to court proceedings also promotes important goals in relation to an individual accused who is involved in the criminal justice system. It is asserted that the openness of court proceedings is essential to an accused's enjoyment of his or her right to a fair trial, since it ensures that the government will have to act fairly and impartially in its handling of the accused's case[95] .

In light of the importance of these goals which are promoted by allowing public access to court proceedings, this right of access has long been recognized[96] as an integral and important part of our justice system[97]. Indeed, in the words of the Law Reform Commission of Canada, "a presumption of public attendance and publicity attaches to proceedings which are judicial in nature"[98].

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[93] As discussed by Cameron, supra, note 69 at 339-341; Linden, supra, note 69 at 302; Lepofsky, Open Justice, supra, note 2 at 47-9; Law Reform Commission of Canada, supra, note 69 at 14-17.

[94] Law Reform Commission of Canada, ibid. at 14. As the court stated in R. v. Squires, supra, note 87, the openness of courts to the public is one of the hallmarks of a democratic society.

[95] Cameron, supra, note 69 at 338; Linden, supra, note 69 at 302; Law Reform Commission of Canada, ibid. at 15-17. Further, restricting public access to a court proceeding such as a trial may well violate the accused's rights under s. 11(d) of the Charter, which provides that the accused has the right to be presumed innocent until proven guilty according to law in a fair and public hearing.

[96] Indeed, as Linden points out, ibid., the societal value of the open court was recognized as far back as the fourteenth century.

[97] Numerous Canadian cases have emphasized the importance of this right of access to open court proceedings: see, for instance, R. v. Rideout, supra, note 92; A.G. N.S. v. MacIntyre (1982), 65 C.C.C. (2d) 129 (S.C.C.); Re Southam Inc. and R. (No. 2), supra, note 8; Edmonton Journal v. A.G. for Alberta, supra, note 70.

[98] Supra, note 69 at 23.

Thus, even though access to court proceedings can be limited pursuant to various Criminal Code provisions[99] such as s.537(1)(h) of the Criminal Code, which allows for exclusion of the public at a preliminary inquiry where exclusion will best serve the ends of justice, and s.486 of the Code, which allows for exclusion of the public at a court proceeding where exclusion is in the interest of public morals, the maintenance of order, or the proper administration of justice[100], the courts are generally reluctant to close court proceedings, and will do so only in rare cases[101]. As a result, closure orders are much less commonly used than are publication bans to protect an accused's right to a fair trial in the face of pre-trial publicity[102].

Where the courts have refused to issue closure orders, they have often done so on the basis that these orders unduly infringe upon freedom of expression . For instance, in R. v. Rideout[103], the trial judge made a closure order at the start of the accused's preliminary inquiry. This order was based on the accused's assertions that anticipated pre-trial publicity, arising from the case's sensational nature, would make it difficult to choose an unbiased jury for the accused's subsequent trial. A journalist challenged the order on the basis that it breached the Charter. The court agreed and set aside the order, holding that the openness of the courts at all stages of trial proceedings is one of the foundations of the criminal justice system and that proceedings can only be closed in the most extreme and limited of circumstances. Here, circumstances did not warrant closing the proceeding to the public, since several procedural safeguards were available to protect the accused's right to a fair trial[104].

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[99] As well, access to open court proceedings might also be limited pursuant to a superior court's inherent power to control the proceedings before it.

[100] In Re Cullen and R. (1981), 62 C.C.C. (2d) 523 (Alta. Q.B.), for instance, the court made an order excluding the public from a preliminary inquiry during the testimony of a 15-year old indecent assault victim. This order was made on the basis that the proper administration of justice required it: since the victim had stated he would not give his testimony if the public was not excluded, it was in the interests of justice to exclude the public and to thus ensure that all admissible evidence was before the court.

[101] Judicial reluctance to close court proceedings has been expressed in many cases: see, for example, R. v. Sayegh (No. 1), supra, note 67; Re Southam Inc. and R. (No. 2), supra, note 8; R. v. Rideout, supra, note 92. Likewise, many commentators have suggested that closure be ordered only in rare cases where there are no other adequate measures available to ensure a prejudice-free trial: see, for instance, Lepofsky, Open Justice, supra, note 2 at 320; Cameron, supra, note 69 at 344; Linden, supra, note 69 at 320-321.

[102] Linden, ibid. at 310; Cameron, ibid. at 332-333.

[103] Supra, note 92.

If a court does make a closure order excluding the public from a court proceeding, the media will also be excluded from the proceeding unless it is expressly exempted from the order, since members of the media are considered to be in no different position than are Canadian citizens in general[105]. In other words, the freedom of expression that is guaranteed under s.2(b) of the Charter is no greater for a reporter or other member of the media than it is for any other Canadian citizen[106]. Thus, excluding the public from a court proceeding may have the effect of excluding the media from the proceeding, which in turn restricts publicity about that proceeding.

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[104] Likewise, in Re Southam Inc. and R. (No. 1), supra, note 84, the court held that s. 12 of the Juvenile Delinquents Act, R.S.C. 1970, c. J-3 (since replaced by the Young Offenders Act, supra, note 5), which provided, inter alia, that childrens' trials were to take place without publicity, was unconstitutional since such a mandatory and absolute ban was not a reasonable limit on the right of access to the courts. See also Re Canadian Newspapers Co. and R. (1983), 6 C.C.C. (3d) 488 (B.C.S.C.), following the Southam decision.

[105] However, the media's right of access differs among the various types of media. While the print media has a general right of access to court proceedings, the electronic media are much more restricted in their access, since Canadian courts generally do not allow television cameras and other forms of electronic media in the courtroom. In Ontario, for instance, s.146 of the Courts of Justice Act, 1984, S.O. 1984, c.11, severely restricts the filming of court proceedings. While this legislation breaches s.2(b) of the Charter, it has been upheld as a reasonable and justifiable limitation on this freedom pursuant to s.1 of the Charter: R. v. Squires, supra, note 87, dealing with the forerunner of this legislation.

This distinction between the print media and the electronic media has been the subject of much controversy. For discussions of whether the electronic media should be permitted at court proceedings, see D.J. Henry, "Electronic Public Access to Court: A Proposal for its Implementation Today", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 441; M. Proulx, "Comment: No Cameras Please", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 491; E. L. Greenspan, "Comment: Another Argument Against Television in the Courtroom", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 497; P.S.A. Lamek, "Comment: A Middle Way", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 499; A. W. MacKay, "Courts, Cameras and Fair Trials: Confrontation or Collaboration?" (1984) 8 Prov. Judges J. #4, 7.

VI. CONCLUSION

The use of prior restraints is an important means of protecting an accused's right to a fair trial in the face of pre-trial publicity. These prior restraints may take the form of either direct restraints such as publication bans or indirect restraints such as closure orders, and may arise either under specific statutory authority or under the inherent common-law powers possessed by superior courts. Regardless of the form they take, however, they raise important questions as to the scope and meaning of freedom of expression and the right to a fair trial when these two rights come into conflict.

Many commentators have argued that prior restraints in general are an unacceptable infringement upon freedom of expression, since an accused's right to a fair trial can be adequately protected by other means, and, in particular, by procedural safeguards set out in the Code[107]. Indeed, reliance upon the availability and efficacy of procedural safeguards is a common theme running throughout the various criticisms that have been made of the use of prior restraints[108].

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[106] R. v. Rideout, supra, note 92; Edmonton Journal v. A.G. of Canada, supra, note 43.

[107] These procedural safeguards are discussed in depth in Chapter 4, "Procedural Safeguards", and include such things as changes of venue, adjournments, jury selection procedures, jury sequestration, mistrials, severance of trials of co-accused, jurors' oaths, and judges' instructions to the jury.

[108] See, for instance, Lepofsky, "Section 2(b) of the Charter", supra, note 69 at 72; M.D. Lepofsky, "Constitutional Right to Attend and Speak About Criminal Court Proceedings--An Emerging Liberty" (1982), 30 C.R. (3d) 87; Cameron, supra, note 69 at 345; Linden, supra,

This reliance upon procedural safeguards as a means of obviating the need for prior restraints, and particularly those direct prior restraints taking the form of publication bans, is troubling. Given the lack of objective study and analysis of the efficacy of procedural safeguards, it is difficult to justify hopeful assumptions that these safeguards will be adequate to ensure an accused's fair trial[109]. Indeed, the studies that have been made to date on the use of these procedural safeguards raise serious concerns as to their efficacy in protecting an accused's right to a fair trial[110].

Further, relying on procedural safeguards to negate the effects of pre-trial publicity, with no guarantee or certainty that these safeguards will be adequate to ensure the impartiality of the accused's trial, pays only lip service to the accused's right to a fair trial. By contrast, delaying the publication of prejudicial information, particularly when such information is by its very nature highly dangerous to the fairness of the accused's trial[111], goes a long way to protecting an accused's right to a fair trial. In other words, relying on procedural safeguards at the expense of publication bans is to rely solely on trying to cure the problems created by prejudicial pre-trial publicity, rather than on trying to prevent those problems from occurring in the first place.

The use of publication bans to delay publication for a short time may amount to a minor infringement upon freedom of expression[112]. It may also

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note 69 at 317-319; R. v. Sophonow (No. 2), supra, note 88; R. v. Robinson, supra, note 74; R. v. Rideout, supra, note 92.

[109] As is discussed in Chapter 4, "The Procedural Safeguards".

[110] Ibid.

[111] Such as is the case with information relating to an accused's confession or an accused's prior criminal record.

[112] Assuming, of course, that a temporary delay in publication is in fact an infringement upon freedom of expression. The media has always reacted strongly against the use of prior restraints on the basis that they violate freedom of expression and freedom of the media. It is questionable, however, whether the media's hostility to prior restraints

temporarily impair, at least to a very small extent, some of the goals that freedom of expression seeks to promote[113]. However, such an infringement upon freedom of expression pales in comparison with the grave risk of harm that unrestrained publicity poses to an accused's fair trial. Thus, even though direct prior restraints such as publication bans may be a minor infringement of freedom of expression, they should continue to be used as an important means of protecting an accused's right to a fair trial.

Indirect prior restraints which take the form of closure orders, however, are infringements of freedom of expression which are more difficult to justify. Indeed, it is difficult to imagine a situation where pre-trial publicity could not be adequately dealt with by a publication ban but would instead require the drastic step of excluding the public and the press from the courtroom. Closure orders should thus be resorted to only in the most extreme of circumstances, where there are no other available means for dealing with the pre-trial publicity and where a publication ban would be completely ineffective.

While publication bans and, in some very limited circumstances, closure orders, should be retained as a means of dealing with the problems posed by pre-trial publicity, they are by no means a perfect way of dealing with these problems. For instance, as some commentators have observed, prior restraints are currently characterized by a lack of clarity, consistency, and

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stems from a deep and genuine commitment to the principles of free expression or from the fact that delaying publication means lower readership figures and lower profits due to "stale" news items no longer of much interest to the public.

[113] It is difficult, however, to understand how delaying publication of information such as an accused's pre-trial confession until after the accused's trial has been completed poses a serious threat to the goals of freedom of expression such as promoting public confidence in the administration of justice, allowing the public to engage in informed debates on reforms to the judicial system, and facilitating the proper functioning of the democratic system. Arguably, postponing publicity is unlikely in most cases to harm the goals sought to be achieved by freedom of expression.

certainty[114]. Indeed, prior restraints are set out in several different sections of the Code and are governed by different rules and provisions.

In order to deal with this lack of consistency and certainty, provisions authorizing publication bans and closure orders should be set out in one coherent and comprehensive part of the Code[115]. Prior restraints could thus be made consistent with one another and could be governed by similar rules and requirements. As Linden describes this reorganization process,

> The new provisions should take into account the Charter of Rights and Freedoms, the realities of modern day life and the nature of the media in the late twentieth century. The chapter [of the Code] should bring together the scattered provisions into a neatly organized, principled, understandable set of rules, developed in a logical and orderly manner[116].

Further, publication bans should be drawn in such a manner as to infringe upon freedom of expression as little as possible. Publication bans should narrowly and precisely set out the information which may not be published and should remain in existence for only a limited, specified period of time. These modifications to prior restraints would allow prior restraints to continue to be an important means, along with contempt of court proceedings, procedural safeguards, and defamation proceedings, of dealing with pre-trial publicity affecting an accused's right to a fair trial.

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[114] Linden, supra, note 69 at 311.

[115] As suggested by Linden, ibid. at 322.

[116] Ibid.

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CHAPTER 3

CONTEMPT OF COURT

I. INTRODUCTION

While the preceding chapter dealt with the use of prior restraints as a means of protecting an accused's right to a fair trial by preventing the publication and dissemination of pre-trial publicity, this chapter, and the following two chapters, discuss the means that exist to deal with the effects of pre-trial publicity once it has been published and disseminated to the public. In particular, this chapter focuses on contempt of court proceedings as one means of guaranteeing an accused's right to a fair trial.

The law of contempt of court has come to be an increasingly important means of dealing with pre-trial publicity and its effects on an accused's fair trial. Indeed, the use of the contempt power to punish those responsible for pre-trial publicity arises directly from the conflict between freedom of speech and the accused's right to a fair trial[1]. As with prior restraints, the use of contempt of court proceedings is a clear indication that in Canada, the accused's right to a fair trial will take priority over freedom of expression.

The importance of the contempt power as a means of resolving this conflict differs in England, the United States, and Canada. In England, the courts rely very heavily upon the contempt power to control and restrain the press in order to preserve the accused's right to a fair trial[2]. In the United States, by contrast, the courts are very reluctant to use the contempt power and instead rely upon procedural safeguards, such as change of venue and continuance proceedings, to ensure that the accused has a fair trial while at the same time leaving untouched freedom of expression[3].

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[1] In the words of R.G. Atkey, in "The Law of the Press in Canada", in G. S. Adam, ed., Journalism, Communication and the Law (Scarborough: Prentice-Hall of Canada Ltd., 1976) 125 at 127, "its arbitrary application by the courts represents the balance that is often struck in the classical conflict between free press and fair trial".

[2] As is discussed in Chapter 7, "The English Experience".

Canadian courts have steered a middle course. While contempt is a very important means of ensuring the accused's right to a fair trial, as it is in England, it is only one of a variety of means used to ensure this right. In Canada, other procedural safeguards[4] and the use of prior restraints[5] also play an important role in resolving the conflict between these two principles and in protecting the accused's right to a fair trial.

Ironically, however, the use of the contempt power as a means of ensuring the accused's right to a fair trial raises questions as to the contemner's own right to a fair trial. In particular, the summary nature of contempt proceedings is often criticized as ensuring the accused's right to a fair trial while at the same time denying the contemner this very right. Many of the calls for reform of the law of contempt have focused on this apparent contradiction. Of course, this is by no means the only criticism made of this complex and often confusing area of law, and a wide variety of suggestions have been made for changing and reforming this area of law

In order to understand the importance of contempt of court as a means of ensuring an accused's right to a fair trial, then, four main topics will be considered. First, contempt of court in general will be briefly discussed. Second, the sub judice branch of constructive contempt, which relates specifically to pre-trial publicity and the accused's right to a fair trial, will be examined in detail. Third, contempt of court will be considered in relation to the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms. Finally, suggestions for reform of this area of law will be discussed.

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[3] As is discussed in Chapter 6, "The American Experience".

[4] As is discussed in Chapter 4, "Procedural Safeguards".

[5] As is discussed in Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests, and Preliminary Inquiries".

II. OVERVIEW OF CONTEMPT OF COURT

A. INTRODUCTION

The offence of contempt of court and the courts' ability to punish such contempts have existed in one form or another in almost every society as a means of ensuring the due administration of justice and of maintaining respect for authority. References to powers similar to our own contempt of court power have been found as early as in the writings of the Emperor Justinian and in the Codes of Canon Law[6].

In England, contempt of court has existed since at least the 12th century[7]. It originated in the concept of the Monarch's Divine Right, and was originally used to ensure that the Sovereign was respected and his or her authority was maintained. As Watkins puts it,

> Born in the days of kingly rule and well suited to early English rulers and their style of government, contempt was an obvious and effective means of assuring the dignity of and respect for the governing sovereign[8].

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[6] C. G. Watkins, "The Enforcement of Conformity to Law through Contempt Proceedings" (1967) 5 Osgoode Hall L.J. 125 at 126.

[7] W. H. Kesterton, The Law and the Press in Canada (Toronto: McLelland and Stewart Limited, 1976) at 8; Sir G. Borrie & N. Lowe, Borrie and Lowe's Law of Contempt, 2nd ed. (London: Butterworth & Co. (Publishers) Ltd., 1983) at 2 (hereafter referred to as Borrie and Lowe).

[8] Watkins, supra, note 6 at 125. See also E. S. MacLatchy, "Contempt of Court by Newspapers in England and Canada" (1938) 16 Can. Bar Rev. 273; H. Fischer, "Civil and Criminal Aspects of Contempt of Court" (1956) 34 Can. Bar Rev. 121.

Initially, the courts were considered the Monarch's agents, and thus derived their contempt powers from their relationship with the Monarch. A contempt of the courts was presumed to be a contempt of the Monarch's authority, and the courts were able to use their contempt powers to punish this presumed contempt of their sovereign's authority. Gradually, however, the contempt power expanded, and the courts began using it as a means of protecting their own dignity and authority rather than simply as a means of upholding their Monarch's dignity and authority[9].

The Canadian law of contempt of court is derived largely from the traditional English law of contempt of court[10]. Contempt of court in Canada is the only criminal offence which arises from the court's common-law authority and not from a statutory provision[11]. The common-law power of the courts to punish for contempt of court is specifically preserved in s.9 of the Criminal Code, which provides that

> Notwithstanding anything in this Act or any other Act, no person shall be convicted or discharged under section 736
>
> (a) of an offence at common law,
>
> (b) of an offence under an Act of the Parliament of England, or of Great Britain, or of the United Kingdom of Great Britain and Ireland, or

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[9] C. F. Beckton, The Law and the Media in Canada (Toronto: The Carswell Company Limited, 1982) at 80.

[10] Indeed, while the English have recently modified and modernized their law of contempt of court, the Canadian contempt of court law has remained largely unchanged from the traditional law that has existed for centuries.

[11] S.M. Robertson., Courts and the Media (Toronto: Butterworth & Co. (Canada) Ltd.,1981) at 21. However, the right of appeal from convictions of contempt, which is set out in s.10 of the Code, is a creation of statute which did not exist at common law. As well, certain Code provisions have codified several traditional forms of contempt. s.545, for instance, allows for the imprisonment of a witness who refuses to testify or to be sworn at a preliminary inquiry. Likewise, s.708 makes it a contempt to fail to attend or remain in attendance for the purpose of giving evidence.

> (c) of an offence under an Act or ordinance in force in any province, territory or place before that province, territory or place became a province in Canada,
>
> but nothing in this section affects the power, jurisdiction or authority that a court, judge, justice or magistrate had, immediately before April 1, 1955, to impose punishment for contempt of court.

B. CLASSIFICATIONS OF CONTEMPT OF COURT

1. Civil Contempt and Criminal Contempt

Although the common-law is the source for most of the law governing contempt of court, there is no universally-accepted definition of this offence. Indeed, as Fischer puts it, "...the difficulties facing any attempt to define contempt satisfactorily cannot be overrated"[12]. This is due in part to the fact that the offence of contempt of court covers a wide variety of acts which are similar only in that they all present some obstacle to the smooth operation of the judicial system[13].

Nevertheless, certain generally-accepted classifications of contempt of court are found in the case law. It is clear that there are two main types of contempt: civil contempt and criminal contempt. Civil contempt refers to the disobedience of a judgment or of a court order made in a civil action. A civil contempt action is initiated by one of the parties in the civil action. Its purpose is coercive: to force the other party to obey the judgement or court order in question. It is thus used to redress a private wrong[14].

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[12] Supra, note 8 at 134.

[13] Law Reform Commission of Canada, Working Paper 20: Contempt of Court (Ottawa: Minister of Supply and Services Canada, 1977) at 7.

[14] Beckton, supra, note 9 at 81; P. S. Lindsay, "Contempt of Court--An Overview" (1986) 1 Crown's Newsletter, Feb. 28, 28 at 32.

Criminal contempt, by contrast, consists of acts, words or writings which obstruct or tend to obstruct or which discredit the due administration of justice. It has been defined as

> ...any act done or anything published tending to obstruct, impair or interfere with the fair administration of justice or to bring the court or judge into contempt or lower his authority; or any act done or writing published tending to obstruct or interfere with the due course of justice or lawful process of the courts[15].

Criminal contempt proceedings can be initiated by both the Federal and Provincial Crowns, by the Court itself, and by a party to an ongoing action before the courts. Its purpose is punitive rather than coercive[16]. Thus, it exists not to force one party to obey a civil order and to thus redress a private wrong, but rather to punish a public wrong: interference with or discredit to the administration of justice.

The distinction between civil and criminal contempt is not always as clear-cut as it might appear, and in some situations the line between these two classes of contempt becomes blurred. Indeed, a particular act can amount to both civil and criminal contempt[17]. For instance, if an injunction prohibits picketing during a labor dispute, picketing in defiance of this injunction is clearly an act of civil contempt. However, if this picketing is done in such a way as to publicly challenge the court's authority or to denigrate the administration of justice, then it moves beyond the realm of the purely civil and becomes, in addition, an act of criminal contempt[18].

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[15] J.C. McRuer, "Criminal Contempt of Court Procedure: A Protection to the Rights of the Individual" (1951) 30 Can. Bar Rev. 225 at 226.

[16] Beckton, supra, note 9 at 81; Fischer, supra, note 8 at 138.

[17] D. Coveney, "Contempt of Court: Bulwark of Freedom or Lynch-Pin of Tyranny?" (1974) 13 U.W.O. L. Rev. 157, at 161.

[18] As was the situation in Poje v. A.G. of British Columbia, [1953] 2 D.L.R. 785 (S.C.C.). Also see Tilco Plastics Ltd. v. Skurjat (1966), 57 D.L.R. (2d) 596 (Ont. H.C.), aff'd (1966), 61 D.L.R. (2d) 664*n* (Ont. C.A.), leave to app. dis.; Re A.G. of Nova Scotia and Miles (1970), 1 C.C.C. (2d) 564 (N.S.S.C.).

In relation to pre-trial publicity and the criminal justice system, however, civil contempt is not relevant. The remainder of this chapter focuses solely on criminal contempt.

2. Types of Criminal Contempt

While contempt of court in general is divided into the two broad categories of civil and criminal contempt, criminal contempt itself is subdivided into two classes: in facie, or direct contempt; and ex facie, or constructive contempt. In facie criminal contempt consists of acts done or words uttered in the presence of the court which bring the administration of justice into disrepute or which obstruct the course of justice. Punishment of in facie criminal contempt is designed to control the individual's conduct before the court and to ensure that trials are calm and orderly[19]. Thus, a witness who refuses to answer questions or who refuses to take the stand will likely be found to be in contempt, as will an individual who insults or curses at the judge during the course of a trial.

Ex facie criminal contempt consists of acts or words or writings done or uttered outside the presence of the court which obstruct the administration of justice or bring it into disrepute. This type of contempt is itself further subdivided into three classes, as was expressed by Lord Hardwicke in Roach v. Garvan[20], a 1742 decision of the Chancery Court in England:

> There are three different sorts of contempt.
>
> One kind of contempt is scandalizing the court itself.
>
> There may be likewise a contempt of this court, in

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[19] Beckton, supra, note 9 at 82.

[20] (1742), 26 E.R. 683 at 684 (Ch.). This is often referred to as The St. James Evening Post case.

> abusing parties who are concerned in causes here.
>
> There may also be a contempt of this court, in prejudicing mankind against persons before the cause is heard.

This statement has been cited and approved in numerous Canadian cases[21].

The first type of ex facie criminal contempt is that of "scandalizing the court", which is often referred to as bringing the court or the administration of justice into disrepute. This consists of acts, words, or writings about a judge, or any other member of the court or judicial system, which somehow tarnish the image of the judicial system.

Many Canadian cases deal with this type of contempt. Scandalizing the court has included the following: alleging that a Crown prosecutor was engaged in persecution instead of prosecution, and had acted without authority and out of a desire to seek notoriety[22]; alleging that a co-accused was tried by a poisoned jury and a poisoned judge and was given a poisoned sentence[23]; stating that a Magistrate's decision was based on political motives[24]; criticizing the death penalty handed down in a particular case by equating the jurors with murderers and stating that the judge chose the time and place of this murder and caused the victim--the convicted accused--to "suffer the exquisite torture of anticipation"[25]; writing a letter to the Attorney-General and to hospital authorities charging the judge in a pending habeas corpus application with dishonesty and corruption[26]; and publishing allegations of partiality against a judge together with a cartoon implying that the judge administered a double-standard of justice[27].

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[21] See, for instance, Sommers v. Sturdy (1956), 6 D.L.R. (2d) 642 (B.C.S.C.); R. v. Sommer (1963), 46 D.L.R. (2d) 49 (Que. Q.B.); A.G. for Manitoba v. Groupe Quebecor Inc., [1987] 5 W.W.R. 270 (Man. C.A.).

[22] R. v. McInroy (1915), 25 C.C.C. 49 (Alta. S.C.).

[23] R. v. Ivens (1920), 32 C.C.C. 358 (Man. K.B.).

[24] Re Borowski (1971), 19 D.L.R. (3d) 537 (Man. Q.B.).

[25] Re Nicol, [1954] 3 D.L.R. 690 (B.C.S.C.).

[26] R. v. Sommer, supra, note 21.

The court's power to punish this type of contempt is based not on a desire to vindicate the personal character of the individual attacked or to punish a personal affront[28], but rather on the need to protect the integrity and the image of the judicial system as a whole. Thus, not all criticisms of or remarks about a judge, or about any other member of the court, will be considered scandalous. Only those words or comments which are directed against the individual in the exercise of his or her duties and which are intended to or which have the effect of tarnishing the image of the judicial system through the individual fall into this category of contempt and will be punished[29].

The second type of ex facie criminal contempt is that of "abusing the parties" to an action. This type of contempt is very rare, and is usually combined with the third category[30].

This final category of ex facie criminal contempt, "prejudicing mankind against persons before the cause is heard", is more commonly referred to as sub judice constructive contempt. It is founded on the sub judice rule, which holds that when a legal matter is under the court's jurisdiction, no one may interfere with the court's proper handling of that matter[31]. Such interference is considered to be an interference with or obstruction to the administration of justice, and thus amounts to contempt of court.

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[27] A.G. of Canada v. Alexander [1975] 6 W.W.R. 257 (N.W.T.S.C.). For other cases dealing with conduct or words scandalising the court, see: Re Ouellet (Nos. 1 and 2) (1976), 32 C.C.C. (2d) 149 (Que. C.A.); R. v. Fotheringham, [1970] 4 C.C.C. 126 (B.C.S.C.); R. v. Western Printing & Publishing Ltd. (1954), 111 C.C.C. 122 (Nfld. S.C.).

[28] Re Nicol, supra, note 25.

[29] Beckton, supra, note 9, at 96.

[30] L. E. Shifrin, "The Law of Constructive Contempt and Freedom of the Press" (1966) 4 Chitty's L. J. 281 at 282.

[31] Robertson, supra, note 11 at 23.

It is this type of contempt which is directly relevant to the issue of pre-trial publicity and the accused's right to a fair trial. Publicity surrounding the accused and his or her trial may affect the minds of those trying the matter. This interferes with and obstructs the court in its handling of the matter. This, in turn, interferes with the accused's fair trial.

The power of the courts to punish sub judice constructive contempt is thus one of the most important means by which the accused's right to a fair trial before an independent and impartial tribunal is protected. At the same time, however, this power is a significant restriction on freedom of the press and freedom of expression[32].

III. SUB JUDICE CONSTRUCTIVE CONTEMPT

A. INTRODUCTION

Sub judice constructive contempt occurs when publicity is intended or calculated to interfere with the fair hearing of an action at a time when the proceedings are sub judice[33]. Clearly, not every publication dealing with a sub judice legal proceeding will be a constructive contempt. To amount to such a contempt, the publication must not only relate to a proceeding which is before the courts, but must do so in such a way as to interfere with or prejudice the court's handling of the proceeding. Zuber, J., put it this way in Bellitti v. Canadian Broadcasting Corp.[34], when he stated that

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[32] D.A. Schmeiser, Civil Liberties in Canada (Toronto: Oxford University Press, 1964) at 222.

[33] MacLatchy, supra, note 8 at 276; Robertson, supra, note 11 at 23.

> It is only when publication or broadcast departs from factual reporting and expresses comments or opinions and those comments or opinions interfere with the administration of justice or prejudice a fair trial that the broadcast or publication will constitute contempt of Court.

Punishment of this type of contempt is intended to ensure that the trier of fact is able to decide the matter with an open mind solely on the basis of the evidence adduced in court, and not with a mind tainted by preconceived ideas and opinions based on extraneous, irrelevant, and often inadmissible facts reported by the media prior to trial. In the words of the Law Reform Commission of Canada, "...the law must preserve its rule that an accused is to be convicted or acquitted only upon evidence admitted at trial, not upon myth, rumours, or media publications"[35].

This rule is central to the accused's right to a fair trial and, indeed, to the due administration of justice in general. McRuer, C.J.H.C. summed up the importance of this principle in this manner:

> ...one of the most sacred things we have is the right to have a fair trial, unprejudiced, before a jury [or a Judge] uninflamed, on behalf of either the Crown or the accused... If we surrender that principle in our administration of justice, we defile our whole administration of justice[36].

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[34] (1973), 44 D.L.R. (3d) 407 at 408 (Ont. H.C.). See also R. v. Charlier (1903), 6 C.C.C. 486 (Que. K.B.); R. v. Thibodeau (1955), 23 C.R. 285 (N.B.S.C.Q.B.D.); A.G. for Manitoba v. Groupe Quebecor Inc., supra, note 21.

[35] Law Reform Commission of Canada, Report 17: Contempt of Court (Ottawa: Minister of Supply and Services Canada, 1982) at 15. This rule has been expressed in numerous Canadian constructive contempt cases. See, for example, R. v. Charlier, supra, note 34; R. v. Thomas, Re Globe Printing Co. (1951), 102 C.C.C. 257 (Ont. H.C.); R. v. Robinson & Co. (1954), 34 M.P.R. 257 (Nfld. S.C.).

[36] R. v. Bryan (1954), 108 C.C.C. 209 at 217 (Ont. H.C.).

It is of interest to note that sub judice constructive contempt is of fairly recent origin. This is largely due to the fact that the great majority of cases involving breach of the sub judice rule arise from publicity by the media[37]. As the dissemination of information has become more sophisticated and more efficient, as the media have come to play an increasingly important and visible role in our society, and as the nature of the media has changed so that media organizations have become profit-hungry corporations, there has been a corresponding increase in the reporting of criminal matters and in the number of cases involving media breaches of the sub judice rule[38].

B. GENERAL PRINCIPLES

While many different types of publicity have amounted to sub judice constructive contempt, five general principles apply to all types of sub judice constructive contempt. These are set out as follows.

First, this branch of constructive contempt of court operates in respect of legal proceedings which are sub judice, or under the court's jurisdiction. Although there has been some question as to when proceedings are in fact sub judice, it is now well established that they are sub judice from at least the time that the information is laid upon which the warrant or summons is or will be issued, and remain sub judice until the appeal has been heard or the time for appeal has passed[39].

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[37] Although constructive contempt is not exclusively confined to the media and applies to anyone who breaches the sub judice rule: see, for instance, Re R. and Carrochia (1972), 14 C.C.C. (2d) 354 (Que. K.B.), in which a Montreal police officer composed and released a press release which was found to prejudice the accused's fair trial. The police officer was found guilty of contempt.

[38] Law Reform Commission of Canada, Report 17, supra, note 35 at 28.

[39] Robertson, supra, note 11 at 48-49; R. v. Charlier, supra, note 34.

Second, the sub judice rule operates in respect of a "publication" which prejudices or interferes with pending legal proceedings. Historically, "publication" referred to printed publications. However, with the rapid proliferation of means by which information is disseminated in modern society, this term has gradually expanded to cover a very wide variety of oral and written communications. "Publication" now includes any means of communicating or disseminating information to third parties. Thus, press releases issued by a Police Department[40] are caught by the sub judice rule, as are radio[41] and television[42] broadcasts and interviews, and newspaper and magazine columns and articles[43].

Third, the mens rea of the offence of sub judice constructive contempt differs from that of other criminal offences. Mens rea in the sense of intention that a publication prejudice an accused's pending trial is not an element of this offence. Instead, the court looks to the results of the publication, and not to the intent behind the publication[44]. Thus, it is sufficient that the publicity has the effect of substantially interfering with the pending legal proceedings. The fact that the contemner did not intend the publication to so interfere, and may not have even known that the proceedings were pending, is no defence[45].

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[40] Re R. and Carrochia, supra, note 37.

[41] See, for instance, R. v. Vairo (1982), 4 C.C.C. (3d) 274 (Que. S.C.); Re A.G. for Manitoba and Radio OB Ltd.. (1976), 31 C.C.C. (2d) 1 (Man. Q.B.).

[42] As in, for example, R. v. Froese (No. 3) (1980), 54 C.C.C. (3d) 315 (B.C.C.A.), aff'g (1979), 50 C.C.C. (2d) 119 (B.C.S.C.).

[43] See, for example, R. v. Bochner (1944), 82 C.C.C. 83 (Ont. H.C.); R. v. Bryan, supra, note 36

[44] B. J. Cavanaugh, "Civil Liberties and the Criminal Contempt Power" (1976-77) 19 Crim. L. Q. 349 at 355.

[45] As is discussed below in relation to the defences available to an alleged contemner.

As a result, the only mens rea required to support a finding of sub judice constructive contempt is the intent to publish the impugned material. Once this is established, the alleged contemner will be found guilty if the material simply had the tendency to interfere with the course of justice. As Nemetz, C.J.B.C., stated in R. v. Froese (No. 3)[46],

> In order to make a finding of guilty, it is not necessary to find either that the words were intended to interfere, that they did in fact interfere with the course of justice--for it will often be impossible to discover the effect of any statement upon a jury. It is only necessary to be satisfied beyond a reasonable doubt that the words were calculated to interfere in the sense of being apt, or having a tendency, to do so...

Fourth, all of the circumstances surrounding a publication must be considered when deciding whether it interferes with an accused's fair trial. The timing of the publicity is relevant: the closer in time the publication is to the accused's trial, the fresher it is in the minds of its readers, and the more likely it will be found to interfere with the trial. Conversely, the farther away in time the publication is from the accused's trial, the less likely it will be found to interfere with the trial. In Re Murphy and Southam Press Ltd.[47], for instance, one of the grounds on which the court dismissed the contempt action against the newspaper was the fact that five months had lapsed between the time of publication and the accused's trial.

Whether the trial is before a judge and jury, as opposed to a judge alone, is also relevant in determining whether a publication interferes with the accused's fair trial. The relevance of this factor is based on the assumption that jurors are more likely to be swayed by and are more amenable to the influence of pre-trial publicity than are judges. Judges, by contrast, are considered to be "more rigorously trained to impartiality" than the average, ordinary citizen and juror[48]. Thus, the fact that the trial is to be before a judge and jury may make the publication more likely to prejudice the accused's fair trial than if the trial were to be before a judge alone.

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[46] Supra, note 42 at 324. This lessened mens rea requirement has been expressed in many other Canadian cases: see, for instance, Re A.G. for Manitoba and Radio OB Ltd., supra, note 41; A.G. for Manitoba v. Groupe Quebecor Inc., supra, note 21; A.G. of Alberta v. Interwest Publications Ltd. (1990), 74 Alta. L.R. (2d) 372 (Q.B.).

[47] (1972), 9 C.C.C. (2d) 330 (B.C.S.C.).

Another relevant circumstance includes the tenor of the publication: the more abusive or sensationalistic it is, the more likely it will be found to interfere with the accused's fair trial. The locality of the publication is also relevant: if the impugned material is published and widely distributed in the jurisdiction in which the trial will be held or from which the jurors will be selected, the publication will be considered more likely to interfere with the accused's trial. Likewise, the damage done by the publication, in the sense of it leading to change of venue and other applications designed to minimize the impact of the publication, is a relevant factor in deciding whether the publication interferes with the accused's fair trial.

The final general principle which applies to all types of sub judice constructive contempt is that the fair trial which is sought to be protected is a trial that is fair to the Crown as well as to the accused. Although the majority of cases involve interference with the accused's fair trial, it is clear that the Crown, as well as the accused, is entitled to a fair trial of the matter before an independent and impartial tribunal[49].

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[48] R. v. McInroy, supra, note 22.

[49] In R. v. Ivens, supra, note 23, for instance, a case which arose from the 1919 Winnipeg General Strike, Ivens discussed his own upcoming trial during a speech before an audience of 1,000, referring to the trial as a farce and a travesty. This was found to be contempt in that it tried to prejudice his own trial and was very likely to prejudice the minds of the jurors against the Crown.

C. CATEGORIES OF PRE-TRIAL PUBLICATIONS AMOUNTING TO SUB JUDICE CONSTRUCTIVE CONTEMPT

1. Criminal Records

One of the clearest types of sub judice constructive contempt is the pre-trial publication of an accused's criminal record. Since the accused's criminal record is not admissible at trial unless the accused takes the stand, the pre-trial publication of his or her record discloses information which is highly prejudicial to the accused, and which is inadmissible evidence at the time of publication. Publication of the accused's criminal record prior to trial, and indeed during trial before it has become admissible evidence, is thus a very serious contempt.

In fact, some cases have held that the publication of an accused's criminal record is so serious as to amount to a prima facie contempt of court. In A.G. of Alberta v. Interwest Publications Ltd.[50], for instance, the respondent published an article which describing the accused, who was charged with the murder of his wife, as possessing a "hair-trigger temper" and as being "explosive, moody and unpredictable". The article also provided details of a previous incident involving a shotgun that had resulted in the accused receiving a summary conviction. The court held that this article amounted to contempt of court, since the juxtaposition of accounts of the accused's character and the accused's criminal record had the effect of portraying him as a person of very bad character who was capable of committing the crime with which he was charged. The article thus created a real and substantial risk of interference with the administration of justice.

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[50] Supra, note 46. For other cases where publication of an accused's criminal record has been held to be contempt, see Re Editions MacLean and Fulford (1965), 46 C.R. 185 (Que. Q.B.); A.G. for Manitoba v. Winnipeg Free Press Co. Ltd., [1965] 4 C.C.C. 260 (Man. Q.B.); A.G. for Manitoba v. Groupe Quebecor Inc., supra, note 21.

In relation to the publication of the accused's criminal record in particular, Berger, J., stated that

> A criminal record...represents judicial pronouncement upon prior conduct; it is likely to be given considerable credence and weight by members of the community and, accordingly, its publication poses a...significant and substantial risk to a fair trial. Publication of the criminal record of the accused who is not at large and does not constitute a danger to the community is, prima facie, a contempt of court [51].

The offence of sub judice constructive contempt is not restricted to the pre-trial publication of only the accused's criminal record. The pre-trial publication of the criminal record of anyone connected with the pending legal proceeding, including witnesses for the Crown and for the Defence, can be a very serious contempt[52].

2. Photographs

The pre-trial publication of photographs of the accused, particularly when identity is reasonably likely to be an issue at trial, may also amount to sub judice constructive contempt[53]. This type of publication poses the danger that witnesses who will identify the accused at trial will see the photographs and will be subconsciously influenced in their identification of the accused at trial.

Thus, a paper which publishes an accused's photograph of an accused prior to his or her trial runs the risk of being found in contempt. If, however, the newspaper publishes the photograph at the police's request as part of a police search for a dangerous suspect, the newspaper's liability is less clear, although it is likely that the paper will be found guilty of at least a "technical" contempt[54].

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[51] Ibid. at 391.

[52] But see Re Murphy and Southam Press, supra, note 47, in which the record of a co-accused who was to appear as a Crown witness was published five months before trial. This was found not to be contempt, partly on the basis that the co-accused's record would have become known at trial since he was to be called as a Crown witness.

[53] At least according to authorities such as Robertson, supra, note 11 at 38-39; Beckton, supra, note 9 at 88; Atkey, supra, note 1 at 129; Kesterton, supra, note 7 at 14. There appear to be no Canadian cases on this point.

3. Confessions and Admissions

The publication of an accused's confessions and admissions prior to those confessions and admissions becoming admissible evidence at the trial is a third type of sub judice constructive contempt. An accused's confessions and admissions are, by their very nature, highly prejudicial to the accused. The law has long recognized the need to test such statements by means of a voir dire to determine the circumstances under which they were made and to determine whether they should be admissible evidence. Only after such statements have been ruled admissible can they be presented in open court as evidence. The pre-trial publication of these statements circumvents the need for a voir dire, in effect removing all judicial control over the admissibility of such evidence. As a result, highly inflammatory and prejudicial material which is as yet inadmissible--and which may never be admissible, depending on the results of the voir dire--is placed before the public and thus before potential jurors and the judge. The pre-trial publication of the accused's admissions and confessions is therefore a very serious contempt[55].

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[54] Robertson, supra, note 11 at 39. "Technical" contempts are discussed below in relation to the punishment for sub judice constructive contempt.

[55] Indeed, the Criminal Code has expressly recognized the danger of pre-trial publication of an accused's admissions and confessions through the enactment of s.542(2), making it an offence to report confessions made by the accused at his preliminary inquiry. However, in at least two cases, pre-trial publication of the accused's confession did not amount to constructive contempt: R. v. Bannister, [1936] 2 D.L.R. 795 (N.B.S.C.A.D.) and R. v. Thibodeau, supra, note 34

This type of contempt is not restricted to the publication of direct, verbatim statements and admissions made by the accused. It is equally a contempt to publish a confession or admission and describe it as the accused's "alleged" confession or admission[56]. It is also a contempt to report the method of arrest in such a way as to imply a confession or admission--as in, for instance, stating that the accused "gave himself up"[57]. Likewise, stating that the court did not accept the accused's attempt to plead guilty to a lesser included offence is a contempt[58], because it suggests that the accused has admitted his or her guilt to at least the lesser offence and that the accused is not being completely sincere and honest in his or her claims of innocence.

4. Comments on the Accused's Background or Character

A fourth type of sub judice constructive contempt is the publication, both before and during trial, of prejudicial comments on or descriptions of the accused's character or background. The danger posed by such comments is clear. As Robertson puts it,

> It is assumed that jurors and even judges would be less sympathetic to the civil rights of convicted criminals or unsavoury characters than they would be to those of people with unblemished records[59].

As a result, the courts deal with these comments and descriptions very severely. Such publications have been found to be contemptuous in numerous Canadian cases.

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[56] Steiner v. Toronto Star Ltd. (1955), 114 C.C.C. 117 (Ont. H.C.).

[57] Robertson, supra, note 11 at 26.

[58] A.G. for Manitoba v. Winnipeg Free Press Co. Ltd., supra, note 50.

[59] Supra, note 11 at 34.

In R. v. Bochner[60], for instance, an article was published which called the accused, who was involved in a divorce action as well as undergoing a trial for armed robbery and kidnapping, a "notorious local underworld character" and stated that his wife was "equally renowned among gangland circles". The article also stated that the accused was presently serving a sentence for assault, was vain and boastful, and was seen in the company of dozens of "worshipping females who were dazzled by his legendary exploits in the realm of crime". Not surprisingly, the Crown's application for a writ of attachment of contempt against the publisher and the owner of the magazine in which this article appeared was successful.

Similarly, in R. v. Froese (No. 3)[61], the accused was charged with conspiracy to traffic in cocaine. On the evening of the first day of the trial, a television report stated that he had been the subject of numerous police investigations over the years in relation to drug and stolen property offences and that no significant charges had yet stuck. Again, the Crown's application for a writ of attachment for contempt was successful. This was affirmed on appeal by the British Columbia Court of Appeal.

Another classic example of this type of sub judice constructive contempt is found in Re Regina and Carrochia[62]. Here, a press release issued by a police officer stated that the accused, whose premises had been raided and who had been charged with eleven breaches of a municipal bylaw, had often been seen with "many well known American Mafia figures of the Organized Crime". The press release also stated the accused had been under investigation for many months and that further charges were to be brought against him. In finding that this press release constituted contempt, the court emphasized that the mention of the possibility of other charges was a "flagrant contempt". Indeed, reference to other investigations being made or to other charges being laid is a very prejudicial comment on the accused's character[63].

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[60] Supra, note 43.

[61] Supra, note 42. See also R. v. Vairo, supra, note 41.

[62] Supra, note 37. See also R. v. Vairo, ibid; R. v. Bryan , supra, note 36; Hatfield v. Healy (1911), 3 Alta. L.R. 327 (S.C.) (dealing with contempt proceedings arising from a foreclosure action which had raised issues of fraud). It should be noted that in A.G. of Alberta v. Interwest Publications Ltd., supra, note 46, the court stated that comments on the accused's background or character should not automatically be held to be contempt, since in many cases the public will see such publications for what they really are: idle gossip and rumour.

5. Matters Not Admissible at Trial

Fifth, it is sub judice constructive contempt to publish information which would not be admissible at trial about the accused or the accused's pending trial. In Re A.G. for Manitoba and Radio O.B. Ltd.[64], for instance, the mother of an accused juvenile charged with murder was interviewed on a radio show. During the interview, she made certain statements about her son which were based on information she had obtained from third parties. The radio station responsible for the interview was held in contempt: since this information had been obtained from third parties, it would have been inadmissible at trial because it offended the rule against hearsay. Therefore, the broadcast of this information gave the listening public, and thus potential jurors and the judge, information which would not otherwise have been available to it[65].

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[63] Re Letourneau-Belanger and Societe de Publication Merlin Ltee. (1969), 6 D.L.R. (3d) 451 (Que. C.A.).

[64] Supra, note 41. Also see R. v. Solloway, Ex parte Chalmers, [1936] 4 D.L.R. 321 (Ont. S.C.), in which a contempt of court application was successful partly on the basis that the newspaper article in question "fairly bristled" with inadmissible facts, opinions, and insinuations.

[65] Likewise, it is a contempt to publish evidence ruled inadmissible in a voir dire: R. v. Hamilton Spectator, [1966] 2 O.R. 503 (C.A.).

6. Publicity Relating to One Proceeding which Prejudices Another Proceeding

Publications which relate to one proceeding and thereby injuriously affect another proceeding also offend the sub judice rule. Such a situation arose in R. v. Thomas[66], in which five men were charged with rape. Four of the men were tried together and were convicted. The fifth accused was being tried in a separate trial when a newspaper published an article criticizing the sentences given to the four other accused and describing them as "young hoodlums". A contempt application was successful, since as a result of the article, counsel for this fifth accused could no longer call one of the four convicted men as a defence witness with the same safety and assurance as if the article had not been published. Thus, the trial of the fifth accused was prejudiced.

This type of contempt is not restricted to publicity surrounding two or more criminal actions; reports on or publicity about a civil action may also prejudice a criminal action[67]. Indeed, the fact that the actions are unrelated in subject matter or are being tried at different times does not preclude a contempt conviction[68].

7. Publications Breaching an Order Banning Publicity

If the court imposes a ban on the publication of certain information pursuant to a specific Criminal Code provision or pursuant to the court's inherent common-law power to control proceedings before it, disclosure or publication of such information may be a contempt. Many provisions in the

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[66] Supra, note 35.

[67] R. v. Robinson & Co., supra, note 35.

[68] Robertson, supra, note 11 at 45.

Code allow for bans on the publication of a wide variety of information and evidence. For instance, the Code provides for a ban on the reporting of evidence concerning a sexual assault victim's sexual activity (s.276(1)); on the disclosure of the complainant's identity in a variety of sexual offence cases (s.486(3)); on the publication of information regarding any portion of a trial at which the jury is not present if the jury is not sequestered (s.648); and on the publication of evidence and representations made at a bail hearing (s.517)[69].

In addition, the Code provides for bans on publicity surrounding a preliminary inquiry. s.539 of the Code allows a judge to make an order directing that the evidence taken at a preliminary inquiry not be published until the accused's trial has ended. Further, pursuant to s.542(2), it is an offence to publish or broadcast a report that a confession or admission was tendered in evidence at the preliminary inquiry or to publish or broadcast the confession itself[70].

Breaches of many of these bans on publicity are specifically made summary offences in the Code. In addition, s.127 of the Code makes it an indictable offence to disobey a court order in general. However, the existence of these offences in the Code may not preclude the court from punishing for contempt those who breach these bans on publicity, provided, of course, that the breach causes or tends to cause interference with the proceeding or with the administration of justice in general[71].

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[69] For a more detailed discussion of court orders and statutes affecting the reporting and publication of court matters, see Robertson, ibid. at 185-286; Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests and Preliminary Inquiries".

[70] Preliminary Inquiries and Coroners' Inquests are dealt with more fully in Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests and Preliminary Inquiries".

[71] Robertson, supra, note 11 at 46. But see R. v. Publications Photo-Police Inc. (1988), 42 C.C.C. (3d) 220 (Que. C.A.), under app. to S.C.C., in which the court held that breaches of

The court also has inherent common-law jurisdiction[1] to order bans on the publication of certain material in order to control the proceedings before it. Those who breach such court orders may also be subject to contempt proceedings. For instance, in R. v. Southam Press (Ontario) Ltd.[72], the trial judge ordered a ban on publicity surrounding the accused's fitness to stand trial hearing. A newspaper breached this order by publishing the evidence given by two psychiatrists at this hearing. The trial judge found this to be a contempt, and this decision was affirmed on appeal.

8. Media Investigations

Finally, it may be a contempt for a media organization to carry out its own private investigation into the issue of the accused's guilt or innocence and to then publish the results of its investigation[73]. However, there appear to be no Canadian cases specifically dealing with this issue.

D. DEFENCES

The preceding discussion of pre-trial publicity and sub judice constructive contempt has shown that this breach of criminal contempt is very wide: a broad meaning has been given to what is a "publication"; the period during which a matter is sub judice stretches from the time that the initial information is laid until the end of an appeal or until the time for appeal has expired; there is a lessened mens rea requirement; and the offence consists of merely publishing material which has the tendency of interfering with an accused's trial. Thus, the person directly or vicariously responsible

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court orders which are specifically made Code offences cannot also be punished at common law as contempt of court.

[72] (1976), 31 C.C.C. (2d) 205 (Ont. C.A.).

[73] Robertson, supra, note 11 at 47; Beckton, supra, note 9 at 89.

for such a publication can do little to avoid conviction for constructive contempt, and while many defences have been raised, few have been successful.

Four major defences are commonly raised by alleged contemners. First, a defence of a lack of *mens rea* is often put forth, whereby the contemner claims a lack of intent to prejudice the accused's fair trial or claims a lack of knowledge that the proceedings were *sub judice*. Given the limited *mens rea* required to establish the offence, it is not surprising that this defence rarely succeeds. Thus, a lack of intent to prejudice the accused's fair trial, or even a lack of knowledge at the time of publication that the trial was pending, is not a valid defence[74]. All that is required to support a conviction for *sub judice* constructive contempt is the intent to publish or broadcast the material in question. Of course, a lack of intent to prejudice the proceedings or a lack of knowledge that the matter was *sub judice* will help establish the contemner's good faith, and this will go towards mitigation of the sentence.

Second, the truth of the published material is sometimes raised as a defence. It is clear, however, that this is not a valid defence to a charge of *sub judice* constructive contempt, particularly if the material is published in the face of a court order banning its publication[75]. The rationale for disallowing this defence of truth is that even if the published material is true, it may be founded on facts which are inadmissible at trial. Its publication thus breaches the *sub judice* rule and interferes with the administration of justice by placing before the public, potential jurors, and the judge, material which would not otherwise be available to them.

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[74] As in , for instance, *R.* v. *Thomas*, *supra*, note 35 and *Re A.G. for Manitoba and Radio OB Ltd.*, *supra*, note 41.

[75] W.G. Mazzei, "Criminal Contempt: Necessity and Procedure versus Fairness and Justice " (1971-72) 36 Sask. L. Rev. 295 at 308; Robertson, *supra*, note 11 at 55.

A third defence occasionally raised is that the party injured by the publicity is precluded from bringing the contempt action against the contemner because other remedies, such as defamation proceedings, are available to him or her. This defence has been emphatically rejected by the courts[76]. The courts have stressed that a single act can make a perpetrator guilty of several different crimes. Thus, the fact that the injured party could have taken defamation proceedings or other measures is irrelevant to a charge of sub judice constructive contempt.

Fourth, the fact that the trial is to be before a judge alone, rather than before a judge and jury, is not a defence. While a judge may not, as a result of his or her training, be consciously influenced by pre-trial publicity, he or she may still be unconsciously influenced and swayed by the publicity. As Stuart, J., put it in R. v. McInroy,

> The mere resolve to be uninfluenced by it [the publicity] might throw the balance of impartiality in the other direction. Furthermore it seems to me that it would be an exceedingly dangerous course to adopt to say that an editor of a newspaper provided only he discovers that a trial is to be by a Judge alone may publish whatever comments he pleases[77].

Perhaps the best defence available to an alleged contemner is to argue that the publication did not interfere with or have the substantial tendency to interfere with the sub judice legal proceeding[78]. This defence will usually succeed where the contemner can establish that the publication was simply a factual reporting which would not affect the minds of those who were to try the matter. It will also succeed where the presence of other procedural safeguards, coupled with a long period of time between the publication and the trial, reduces the danger of prejudice to a very minimal risk. In addition, it is always open to the alleged contemner to argue a lack of intent to publish or broadcast the material, thus negating the lessened mens rea required for sub judice constructive contempt.

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[76] Re Letourneau-Belanger and Societe de Publication Merlin Ltee., supra, note 63; R. v. Solloway, Ex parte Chalmers, supra, note 64.

[77] Supra, note 22 at 54; see also Re R. and Carrochia, supra, note 37. For a rare example of a case where this defence did succeed, see Re Depoe and Lamport (1967), 66 D.L.R. (2d) 46 (Ont. H.C.). Other defences which have not succeeded include arguing that legal advice was sought before publication, and that the court had not warned reporters of the possibility of court proceedings arising from their reports made on the day's proceedings.

[78] It succeeded in Bellitti v. Canadian Broadcasting Corp., supra, note 34; Staples v. Isaacs, [1939] 4 D.L.R. 556 (B.C.S.C.); A.G. for Ontario v. Canadian Broadcasting Corp. (1977), 39 C.C.C. (2d) 182 (Ont. H.C.); R. v. Thibodeau, supra, note 34.

E. LIABILITY

If the party bringing the contempt application is able to establish the existence of sub judice constructive contempt beyond a reasonable doubt, and if the contemner is unable to raise a successful defence, the question of liability for the contempt then arises. The actual author or broadcaster of the publication will usually be held liable for the publication and will be found guilty of contempt. However, a reporter who merely provides information to be compiled into a story by others may be less likely to be found liable than will a reporter who writes and files the story and who is responsible for its contents[79].

The court will also look beyond the actual author or broadcaster to all those who were in some way responsible for the publication. For instance, the publisher of the newspaper in which the offending article appeared will often be found guilty of the contempt on the basis of vicarious liability, since the reporter or columnist directly responsible for the publication is his or her employee. In A.G. for Manitoba v. Groupe Quebecor Inc.[80], for instance, the publisher of the newspaper in which the impugned article appeared was found guilty of contempt and was fined, even though the publisher had no direct knowledge of or input into the publication.

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[79] Robertson, supra, note 11. There are many cases in which the reporter or author has been held liable, as in, for instance, R. v. Societe de Publication Merlin Ltee. (1978), 43 C.C.C. (2d) 557 (Que. C.A.); Re A.G. for Manitoba and Radio OB Ltd., supra, note 41; and R. v. Southam Press (Ontario) Ltd., supra, note 72.

Likewise, the proprietor of the newspaper, the radio station, or the television station responsible for the publicity will often be held liable for the contempt. This liability rests partly on the basis of the proprietor's vicarious liability for the act of its employees, and partly on the basis that the proprietor benefits directly from the publications contained in or made by its paper or station, and is thus responsible for those publications[81].

As with the publisher, the proprietor's ignorance of the contents of the publication or of the fact that proceedings are pending will be no defence. In addition, the proprietor may be liable even if the writer or speaker of the contempt was not an actual employee but was, rather, an independent contributor. However, dicta in one Canadian case has suggested that the owner of a radio station, at least, may escape contempt liability for words spoken spontaneously by a person being interviewed if the owner had exercised proper care[82].

The editor of a newspaper and the producer or executive producer of a radio or television station may also be held liable for the publication of the contemptuous material on the basis that these individuals establish the controls and mechanisms of publication, and are thus responsible for what is published[83]. In Hatfield v. Healy[84], for instance, Harvey, C.J. stated that

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[80] Supra, note 21. See also R. v. Bryan., supra, note 36; R. v. Southam Press (Ontario) Ltd., supra, note 72.

[81] Robertson, supra, note 11 at 104. See, for instance, R. v. Southam Press (Ontario) Ltd., supra, note 72, as an example of a proprietor being held in contempt.

[82] R. v. Bengert (No. 16) (1979), 15 C.R. (3d) 202 (B.C.S.C.).

> Newspaper editors who undertake the responsibility of managing papers must be held responsible for what appears in their newspapers, and cannot be allowed to shift this responsibility...

This comment is equally applicable to producers and executive producers of radio and television stations.

Again, the editor or producer's lack of knowledge of the publication's contents or of the fact that the proceedings were sub judice at the time of publication is no defence. However, if the editor or producer was on holiday or on leave at the time that the impugned material was published, he or she will not be held responsible for the contempt[85].

Finally, the distributor of a newspaper or magazine may be held in contempt. In R. v. Bryan[86], articles were published in three detective magazines in the United States prior to the accused's murder trial in Canada. The magazines were then distributed in Canada. The articles were found to be contemptuous, and the publishers of the three magazines, as well as the editor of one of the magazines, were held liable for contempt. In addition, the Canadian distributor of these magazines was held liable for contempt on the basis that he had to take responsibility for the circulation of the magazines in the geographic area in which they would do the most harm; that he knew about a similar previous case and had thus been warned; and that he must have known about this pending case since it had been highly publicized. The court stressed that Canadian distributors of magazines originating outside Canada must be controlled and will be held responsible for the publications in those magazines, even though they may not be aware of the contents of the magazines they distribute.

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[83] Robertson, supra, note 11 at 105-106.

[84] Supra, note 62 at 331. Cases in which the editor or producer has been held liable include R. v. Societe de Publication Merlin Ltee., supra, note 79; Steiner v. Toronto Star Ltd., supra, note 56.

[85] R. v. Western Printing & Publishing Ltd., supra, note 27.

[86] Supra, note 36.

Indeed, the fact that a news story, newspaper, or magazine originated outside Canada will not preclude contempt convictions if this foreign publicity is intended to interfere with or substantially tends to interfere with legal proceedings which are sub judice the Canadian courts. Similarly, a radio or television broadcast originating from outside Canada may be a contempt if the broadcaster's signal enters into the jurisdiction of the court before which the proceedings are pending and if the broadcast interferes with those proceedings[87]. As a result, sensationalistic publications by American journalists and broadcasters concerning Canadian cases which are sub judice can create liability for Canadian distributors, and, presumably, Canadian publishers, editors, and all others dealing with the American publication in Canada[88].

F. PROCEDURE

An application for sub judice constructive contempt may be brought by the accused, by the Crown, or by the court itself[89], unless the application is made by way of indictment. In that case, only the Crown may bring the application. The application must be heard before a superior court, for only superior courts have the jurisdiction to punish ex facie criminal contempt.

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[87] Robertson, supra, note 11 at 111.

[88] Beckton, supra, note 9 at 87.

[89] R. v. Bengert (No. 16), supra, note 82; R. v. Bengert (No. 15) (1979), 15 C.R. (3d) 197 (B.C.S.C.); Re Letourneau-Belanger and Societe de Publication Merlin Ltee., supra, note 63.

The jurisdiction of tribunals and inferior courts of record, by contrast, is restricted to in facie criminal contempt, and they have no authority to punish ex facie criminal contempt or to deal with a contempt application for an act which is specifically addressed in the Code[90].

This distinction between superior and inferior courts is crucial. In R. v. Vermette[91], for instance, the Alberta Provincial Court heard the initial contempt application and convicted the contemner. However, since the contempt was ex facie, it could be deal with only by a superior court. The Provincial Court, a court of inferior jurisdiction, did not have jurisdiction to deal with the contempt; its conviction was overturned by the Alberta Court of Appeal, whose decision was affirmed by the Supreme Court of Canada.

The contempt application may be brought in one of two ways: by indictment or by summary procedure. At one time, the use of the criminal information was a third way of bringing a contempt application, but s.576 of the Criminal Code has abolished the criminal information.

Historically, contempt of court was brought by indictment and was dealt with in the same manner as any other criminal offence. In the early 1500's, however, the Star Chamber in England began to deal with in facie criminal contempt in a summary manner, although ex facie criminal contempt continued to be dealt with by way of indictment.

In the late 1700's, the summary procedure was extended to apply to ex facie criminal contempt as well as to in facie criminal contempt. This was due to a historical error. In the 1765 case of R. v. Almon[92], the opinion of one of the judges, Sir Eardley-Wilmot, referred to the use of the summary procedure in ex facie criminal contempt proceedings as stemming from "immemorial usage and practice", whereas in reality ex facie criminal contempt had always been dealt with by indictment. Nonetheless, this opinion, even though it was never delivered and even though it was incorrect, has been relied upon as the basis on which the use of the summary procedure for ex facie criminal contempt is founded. As Watkins puts it,

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[90] Robertson, supra, note 11 at 87-88; Law Reform Commission of Canada, Working Paper 20, supra, note 13 at 18; Re R. and Monette (1975), 64 D.L.R. (3d) 470 (Ont. H.C.).

[91] [1987] 4 W.W.R. 595 (S.C.C.).

[92] (1765), 97 E.R. 94 (K.B.).

> Rex v. Almon has been accepted and extended by an unbroken line of English, American and Canadian cases. As well, the Criminal Code of Canada [s. 9] has impliedly sanctioned the use of the summary power...[93]

Today, the summary procedure is used almost exclusively in cases of sub judice constructive contempt, although procedure by indictment has been preserved by s. 8 of the Code and remains available[94].

"Summary procedure" refers to a procedure which is not codified but which has instead developed through the common-law. It is usually begun by a notice of motion to the superior court, whereby the court is asked to issue a writ of attachment or a committal order against the alleged contemner. The motion requires the contemner to appear before the court for a determination of whether he or she has committed the contempt. This procedure is, at least in theory, speedier than proceeding by way of indictment and trial. The summary procedure is thus usually justified on the basis of urgency, "...because the court must move quickly to protect a trial proceeding if it suspects that the media is interfering with it"[95].

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[93] Supra, note 6 at 127. See also Coveney, supra, note 17 at 165; MacLatchy, supra, note 8 at 274; Tilco Plastics Ltd. v. Skurjat, supra, note 18.

[94] R. v. Vermette, supra, note 91. However, there appear to be no cases of sub judice constructive contempt being dealt with by way of indictment since the very early 1900's.

[95] Robertson, supra, note 11, at 89.

There is some debate as to the contemner's rights at this hearing. Indeed, the phrase "summary procedure" is misleading, for it implies that there is one standard procedure followed by the courts which sets out the exact rights given to the contemner. In reality, the courts have used various types of "summary procedure" which differ widely in the rights given to the contemner.

In some cases, the contemner's rights have been very narrowly limited: the contempt hearing is in the nature of a show cause hearing at which the contemner must show cause why he or she should not be cited for contempt; is in effect presumed guilty and carries the burden of proof; has no right to call witnesses; and can be compelled to testify[96]. The contemner is thus deprived of many of the traditional rights and safeguards usually afforded to an accused charged with a criminal offence.

In other cases, however, the alleged contemner's rights are much broader: he or she is presumed innocent; is allowed to call and to cross-examine witnesses; and has the right to make a defence--or, indeed, to make no defence at all[97]. The alleged contemner is thus given all the rights normally afforded to an accused, save the right to be tried before a jury.

The courts have been moving towards this latter type of summary procedure. This may be largely due to the influence of the Canadian Bill of Rights and the Canadian Charter of Rights and Freedoms. Even if the Bill of Rights and the Charter do not apply to the common-law offence of contempt[98], it has been held that the summary procedure must, at the least, be conducted in accordance with the principles of natural justice that existed immediately prior to the Charter's enactment[99].

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[96] Watkins, supra, note 6 at 150; Cavanaugh, supra, note 44 at 356-357; R. v. Sommer, supra, note 21.

[97] See, for instance, Tilco Plastics Ltd. v. Skurjat, supra, note 18; R. v. Cohn (1984), 42 C.R. (3d) 1 (Ont. C.A.); Re Smallwood (1980), 68 A.P.R. 198 (Nfld. S.C.T.D.).

[98] As is discussed below in relation to the Charter and its impact upon freedom of expression.

At present, the summary procedure commonly followed by the courts is still initiated by a notice of motion requiring the alleged contemner to appear before the court. However, the burden is on the Crown to prove the alleged contemner's guilt beyond a reasonable doubt. The contemner is entitled to call and to cross-examine witnesses, and is not required to testify or to make any defence at all. The contemner is not, however, entitled to be tried before a jury: allowing trial by jury would defeat the whole purpose of proceeding summarily, which is to deal quickly with cases presenting a real and immediate danger to the accused's fair trial or to the administration of justice in general.

The courts have continually stressed that this summary procedure should be used only in the most obvious and urgent cases where it is necessary to allow the courts to continue their function. As MacKay, J., stated in R. v. Wallbridge[100], "this disciplinary power possessing practically arbitrary jurisdiction, should be jealously and carefully watched and exercised with anxiety and reluctance".

Despite this judicial awareness of the need to use the contempt power very cautiously and reluctantly, there has much criticism of the summary procedure and of the potential danger it poses to the rights of the alleged contemner. As Jacob Ziegel puts it,

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[99] A.G. for Manitoba v. Groupe Quebecor Inc., supra, note 21.

[100] [1936] 4 D.L.R. 376 at 379 (Ont. S.C.). Other similar statements expressing the court's concern about this procedure can be found in Hebert v. A.G. for Quebec (1966), 50 C.R. 88 (Que. Q.B.); Re Campbell and Cowper, [1934] 3 W.W.R. 593 (Alta. S.C.A.D.); R. v. Strang, [1968] 2 C.C.C. 205 (N.W.T.T.C.); and the dissent of Laskin, J., in McKeown v. R., [1971] S.C.R. 446.

> ...it is a strange doctrine which preaches that a traitor, a murderer, and one who incites the violent overthrow of a government is entitled to the time-honored right of trial by jury, but that public policy demands that a printer or distributor who may not even have read the document for whose publication he is held responsible shall be deprived of the protection of his peers[101].

Those who criticize the summary procedure[102] emphasize its arbitrariness, its lack of codification, and its failure to provide basic rights and guarantees to the contemner. Further, critics often point out that the summary procedure, which is traditionally justified on the grounds of expedience in an urgent situation, is often no faster than proceeding by way of indictment and trial[103].

Those who support the summary procedure[104] stress that it is a necessary means of maintaining order within the court and is an expedient means of proceeding in an urgent situation. Thus, it is seen as essential to the effective and impartial administration of justice.

Given the recent move by the courts towards a summary procedure which is more in keeping with the principles of natural justice, if not with all the requirements of the Charter, earlier criticisms of this procedure which are based on the traditional lack of rights and safeguards afforded the contemner may not be as well-founded as they once were. Of course, the closer the summary procedure moves towards the ordinary trial procedure, rights, and safeguards used for and available in other criminal offences, the less justification there is for its continued existence as an alternative to proceeding by indictment. Arguably, a summary procedure which gives the contemner the same rights and guarantees as any other accused (save the right to be tried before a jury) and which is no faster than proceeding by indictment serves no different function from that served by procedure by indictment, and should thus be abolished.

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[101] J.S. Ziegel, "Some Aspects of the Law of Contempt of Court in Canada, England, and the United States" (1959-60) 6 McGill L.J. 229 at 260.

[102] See, for instance, Cavanaugh, supra, note 44; Ziegel, supra, note 101.

[103] As was the case in A.G. for Ontario v. Canadian Broadcasting Corp., supra, note 78, where a variety of circumstances caused the Crown's contempt application to stretch over a period of fourteen months.

[104] See, for instance, Watkins, supra, note 6.

G. PUNISHMENT FOR SUB JUDICE CONSTRUCTIVE CONTEMPT

The penalty for _sub judice_ constructive contempt, or indeed for any type of contempt, is not set out in the _Criminal Code_. One must look instead to the common-law to determine the penalties that may be imposed on a convicted contemner. A term of imprisonment is possible ~~in a case of~~ very serious _sub judice_ constructive contempt, although this has rarely been imposed in Canada[105]. Far more common penalties are the imposition of a fine together with the costs of the contempt application; the imposition of a fine without the application costs; and the application costs without an additional fine.

In some situations, the court will find an alleged contemner guilty of contempt but will impose no penalty. This is a "technical contempt": the publication is clearly contemptuous, but for one reason or another the contempt is not thought to deserve punishment and the court will not impose a penalty. This usually occurs where the contempt is very insignificant and is unlikely to cause any substantial prejudice to the sub judice proceeding[106].

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[105] Indeed, _R._ v. _Bryan_, _supra_, note 36, appears to be the only Canadian case in which a member of the media has been imprisoned for _sub judice_ constructive contempt.

In the majority of cases, however, a monetary penalty of some sort will be imposed on the convicted contemner. In determining the amount of the penalty, and indeed in determining the penalty in general for sub judice constructive contempt, the primary aim of the penalty is deterrence. Indeed, the need to deter other members of the media from committing similar contempts is a theme which runs throughout the case law, although it is sometimes referred to in terms of "encouraging" publishers and other members of the media to "strive for a high standard of care"[107].

In some situations, the fine imposed not only reflects this primary aim of deterrence but is also calculated to include the value of time lost due to the trial's interruption by the contempt proceeding. In effect, such a fine is aimed at requiring the contemner to make at least partial restitution to the Crown for the time and money lost as a result of the contempt application. Thus, in R. v. Societe de Publication Merlin Ltee.[108], the publisher was fined $12,000, the editor $2,000, and the author $2,000. The publisher's fine of $12,000, which appears to be the highest fine imposed to date in Canada, was calculated to reflect the fact that the contempt had resulted in a mistrial and in the empaneling of a new jury. The fine was thus intended to make partial restitution for these resulting expenses[109].

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[106] Borrie and Lowe, supra, note 7 at 62.

[107] Cases emphasizing the deterrent aim of sentencing in sub judice contempt cases include R. v. Robinson & Co., supra, note 35; R. v. Southam Press (Ontario) Ltd., supra, note 72.

[108] Supra, note 79.

[109] Also see R. v. Froese (No. 3) (1979), 50 C.C.C. (2d) 119 (B.C.S.C.), aff'd (1980), 54 C.C.C. (2d) 315 (B.C.C.A.); R. v. CHEK TV Ltd. (1987), 33 C.C.C. (3d) 24 (B.C.C.A.), leave to app. ref. 24*n*, aff'g (1985), 23 C.C.C. (3d) 395 (B.C.S.C.).

The courts will consider a number of factors when determining the penalty to be imposed. Some of the factors will mitigate the sentence; others will aggravate it. A sincere apology by the contemner is a factor which will be in the contemner's favor, although it may not totally purge the contempt[110].

The contemner's lack of bad faith is another factor which mitigates the sentence. In effect, this factor is a denial of mens rea in that the contemner denies any intent to prejudice the accused's trial. While denial of mens rea is not a defence to the contempt, it is a mitigating factor in sentencing[111].

Likewise, the conditions under which the contemner was working at the time of the publication may, in some situations, be a mitigating factor. In R. v. Hamilton Spectator[112], for instance, the Ontario Court of Appeal reduced the convicted reporter's fine from $1,500 to $500. This reduction reflected the fact that the reporter had been working under a great deal of pressure and had had to rely on information given to him by another reporter for a different newspaper. Conditions at the contemner's workplace were thus a mitigating factor in the imposition of sentence.

The courts will also consider factors which aggravate the sentence. For instance, the contemner's attitude is relevant. Just as the existence of a sincere apology showing a chastened and remorseful attitude will mitigate the sentence, the lack of an apology, as well as any other evidence showing a defiant and unremorseful attitude, will aggravate the sentence[113].

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[110] R. v. Charlier, supra, note 34; Robertson, supra, note 11 at 114. Indeed, in some cases the making of the apology itself may be the penalty: see, for instance, Re Borowski, supra, note 24, dealing with constructive contempt scandalizing the court.

[111] Cases in which a lack of bad faith has been a mitigating factor include R. v. Thomas, supra, note 35; R. v. Robinson & Co., supra, note 35.

[112] Supra, note 65.

[113] Robertson, supra, note 11 at 113.

Another aggravating factor is the contemner's previous experience with contempt proceedings. This was the case in R. v. Societe de Publication Merlin Ltee.[114], in which the trial judge took into consideration the fact that the publisher specialized in judicial reporting and had been charged and convicted of contempt in the past. A fine of $12,000 was imposed on the publisher, which was upheld on appeal by the Quebec Court of Appeal.

Other aggravating factors include the nature of the publication--whether it is an editorial comment as opposed to an unthinking, spontaneous statement made during a broadcast[115]; the contemner's knowledge of the pending proceedings, since this goes to show the deliberateness of his or her contempt[116]; and the fact that the publication includes deliberately falsified information, such as false admissions allegedly made by an accused[117].

H. APPEALS

Section 10 of the Criminal Code establishes a right of appeal from sentence and conviction in relation to both in facie and ex facie contempt, provided that the contempt was dealt with by way of summary procedure. Thus, a contemner convicted of sub judice constructive contempt has the right to appeal both the sentence and the conviction pursuant to s.10.

This appeal provision is a relatively recent development. Prior to 1953, the Code made no provision for any appeal from contempt convictions and sentences, and this was one of the major criticisms of contempt of court[118]. In 1953, however, the Code was amended to allow for an appeal from both the sentence and conviction in cases of ex facie criminal contempt, and from the sentence only in cases of in facie criminal contempt. In 1972, the Code was further amended to allow for a right of appeal from the conviction in cases of in facie criminal contempt[119].

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[114] Supra, note 79.

[115] R. v. Froese (No. 3), supra, note 108.

[116] Ibid.

[117] R. v. Bryan, supra, note 36.

[118] See, for instance, McRuer, supra, note 15.

It should be noted that s.10 of the Code applies only to contempt which is dealt with by summary procedure. Where the contempt is dealt with by indictment, all the normal rights of appeal that exist regarding indictable offence convictions and sentences are available to the contemner.

IV. CANADIAN BILL OF RIGHTS

The effect of the Canadian Bill of Rights on contempt of court has been the subject of much discussion. Most of those commentators discussing the impact of the Bill of Rights on contempt of court have dwelt on the summary procedure and its violation of the contemner's rights, rather than on the impact that contempt of court has on freedom of expression. These commentators have concluded that the summary procedure that is utilized by the courts to deal with contempt is a clear violation of the Bill[120].

In particular, the summary process has been seen as violating ss.2(e) and (f) of the Bill, which provide for the rights of an accused to have a fair hearing in accordance with the principles of fundamental justice and to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. Because the summary process, at least in theory, deprives the accused of his or her traditional rights and safeguards, such as the presumption of innocence, the right to call and cross-examine witnesses, and the right not to be compelled to testify, it directly conflicts with s.2 of the Bill of Rights and is thus inoperative[121].

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[119] Law Reform Commission of Canada, Working Paper 20, supra, note 13 at 7.

[120] See, for instance, Mazzei, supra, note 75 at 328-329.

It should be noted that those critics who argued that the summary procedure violated the Canadian Bill of Rights were considering a summary procedure which was, at that time, characterized by a lack of rights and safeguards afforded to the alleged contemner. However, the courts have gradually moved away from this classic summary procedure towards a procedure in which the contemner is afforded the same rights and safeguards as is any other accused, save the right to a jury trial[122]. These earlier arguments may thus no longer be valid.

While commentators have argued that the summary procedure violates the Bill, relatively little judicial attention has been paid to this issue. In Bergeron v. Societe de Publication Merlin Ltee.[123], the court did address this issue to some extent. In this case, the court ordered the alleged contemner to appear and show cause why it should not be committed for contempt. The contemner brought a motion to quash this order on the grounds that it breached s.2(f) of the Bill of Rights, arguing that the order in effect shifted the onus of proof onto the contemner and thus robbed the contemner of the presumption of innocence guaranteed in s.2(f).

The Quebec Court of Queen's Bench granted the contemner's motion and quashed the order on the basis that the contemner could not be forced to testify and was entitled to refuse to testify without losing the benefit of the presumption of innocence. Thus, the court indirectly upheld the Canadian Bill of Rights over contempt of court and the summary procedure by striking down a court order commencing the summary procedure on the grounds that it violated the presumption of innocence guaranteed under the Bill.

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[121] Cavanaugh, supra, note 44 at 363. See also Mazzei, ibid. at 328.

[122] Law Reform Commission of Canada, Report 17, supra, note 35 at 16.

[123] (1970), 14 C.R.N.S. 52 (Que. Q.B.).

The only other reference to the Canadian Bill of Rights is found in Hebert v. A.G. for Quebec[124], in which the court stated in obiter that s.2(d) of the Bill may affect contempt of court in that the summary procedure may need to be changed to conform with s.2(d) of the Bill. However, as this case was decided on other grounds, the court found it unnecessary to discuss this issue further.

V. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

As with the Canadian Bill of Rights, the enactment of the Canadian Charter of Rights and Freedoms has led to discussion of its effect on contempt of court. Again, it is the summary procedure which is of most concern to those considering the relationship between the Charter and contempt of court. Many commentators feel that the law of contempt of court does not meet the requirements of the Charter in that the summary procedure violates the legal rights guaranteed by the Charter to an accused. As Martin states, "the law of contempt in Canada is a systematic affront to the specific guarantees contained in the Charter and to the philosophy which underlies it"[125].

In particular, it is argued that the summary procedure offends ss.7, 11(c) and 11(d) of the Charter. These sections provide for life, liberty and security of the person and the right not be to deprived thereof except in accordance with the principles of fundamental justice; the right not to be compelled to testify against oneself; and the right to be presumed innocent until proven guilty in a fair and public hearing by an independent and impartial tribunal.

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[124] Supra, note 100.

[125] R. Martin, "Contempt of Court: The Effect of the Charter", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 207 at 214. See also H. Kersley, "Criminal Contempt: Proposals for Reform" (1984) 42:2 U.T. Fac. L. Rev 41 at 51; R. Martin, "Several Steps Backward: The Law Reform Commission of Canada and Contempt of Court" (1983) 21 U.W.O.L.Rev. 307 at 314.

Thus, it is argued that because the summary procedure denies the contemner such rights and safeguards as the right to call and cross-examine witnesses, the right not to be compelled to testify, and the presumption of innocence, it breaches the Charter. However, as stated above in relation to the Canadian Bill of Rights, the gradual move by the courts away from this classic summary procedure towards a procedure more in keeping with that used for other accused may be an answer to much of this criticism.

The one remaining right still not afforded to the alleged contemner is the right to be tried before a jury. It is on the denial of this right that judicial attention has focused in relation to the Charter and contempt of court. The issue is thus whether the denial of this right of jury trial to a person charged with contempt of court offends s.11(f) of the Charter.

Pursuant to s.11(f) of the Charter, any person charged with an offence which has a maximum punishment of five or more years imprisonment has the right to be tried by a jury. Because the Code does not set out a prescribed penalty for contempt of court, the punishment for contempt could potentially be a period of imprisonment of five or more years. Arguably, therefore, an alleged contemner has the right to be tried by a jury.

In determining whether an alleged contemner does indeed have the right to a jury trial, the courts have taken two different approaches. These approaches turn largely on a determination of whether contempt of court is an "offence" within the meaning of s.11 and whether s.11 in general applies to contempt of court. In R. v. Cohn[126], which dealt with in facie contempt arising from the contemner's refusal to be sworn and to testify, the court held that in facie contempt is an offence under s.11 of the Charter and that the requirements set out in ss.11(c) and (d) apply to contempt of court and to the summary procedure. However, the court went on to hold that because sentences of imprisonment for contempt are invariably, in practice, for less than five years, s.11(f) does not apply to a person charged with contempt of court. Thus, the court held that while contempt of court is governed in general by the rights and protections guaranteed in s.11, s.11(f) in particular does not apply to contempt of court.

This decision was, however, specifically confined to in facie contempt. Further, it has been criticized by some commentators as being based on shaky, if not spurious grounds, in that interpreting s.11(f) by referring to the average number of years imposed as a sentence in effect determines a fundamental right ex post facto.[127]

Other courts have taken a different, and arguably sounder, approach. In A.G. for Manitoba v. Groupe Quebecor Inc.[128], the Manitoba Court of Appeal held that while criminal contempt of court is in a broad sense an offence, not every offence is an "offence" within the meaning of s.11 of the Charter. The Court arrived at this conclusion by considering the Supreme Court of Canada's decision in R. v. Vermette[129] and the Quebec Supreme Court's decision in A.G. for Quebec v. Laurendeau[130]. These cases held that s.9 of the

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[126] Supra, note 97.

[127] J.C. Hebert, Annotation following R. v. Cohn, supra, note 97.

[128] Supra, note 21.

[129] Supra, note 91.

[130] (1982), 33 C.R. (3d) 40 (Que. S.C.).

Code does not create an indictable offence for the purposes of the Code, but instead preserves the court's inherent power to punish for contempt of court.

The Manitoba Court of Appeal in Groupe Quebecor relied on these decisions to hold that while contempt of court is indeed an offence, it is an offence of a different character than a true Criminal Code offence. Thus, contempt of court is not affected by s.11 of the Charter, and s.11(f) does not apply to an alleged contemner.

The implications of this decision and the supporting decisions it relied upon are clear. If contempt of court is not affected by s.11 of the Charter, none of the rights guaranteed thereunder, including the right to be presumed innocent and the right not to be compelled to testify against oneself, as well as the right to be tried by a jury, are available to an alleged contemner.

However, although the contemner may not be entitled to the specific Charter protections set out under s.11, the contempt proceedings must still be fair to him or her. As Huband, J.A., stated in Groupe Quebecor,

> ...s.11 of the Charter was not meant to include contempt proceedings. That does not mean that a citation for contempt can proceed in an unfair manner. A party charged with contempt is entitled to a determination of the charge in accordance with the principles of natural justice which governed our affairs before the Charter of Rights came into being[131].

There are thus two different lines of authority answering the broad question of whether s.11 in general applies to contempt of court. In relation to the narrower question of whether s.11(f) in particular applies to contempt of court, the case law shows a strong judicial reluctance to allow the alleged contemner to be tried before a jury. While the courts are firm in requiring that the contempt procedure be fair to the alleged contemner and that the procedure meet the principles of natural justice, if not the explicit requirements of the Charter, the courts are equally firm in refusing to allow the contemner to be tried before a jury. The courts justify this on the basis that allowing a jury trial would frustrate the court's inherent power to control and regulate the administration of the criminal justice system.

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[131] Supra, note 21 at 277.

Indeed, with the exception of the Cohn case, the courts are very reluctant to hold that s.11 of the Charter applies to contempt of court in general and to the summary procedure in particular. Given this judicial attitude, then, even if contempt of court is considered an "offence" under s.11, the courts would likely hold that s.1 justifies the refusal of any of these s.11 rights to the alleged contemnor[132] .

VI. PROPOSALS FOR REFORM OF CONTEMPT OF COURT

A. INTRODUCTION

The law of contempt of court has received much criticism, and almost every aspect of this area of law has been challenged. Contempt of court is seen by many commentators as being too vague and uncertain. In the words of Beckton,

> One of the major problems and complaints concerning the contempt area is that it is so uncertain. In some instances publications may seem to be in contempt but the court takes no action, whereas in a seemingly similar situation the editor, reporter and publisher are all convicted and fined[133].

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[132] As was the case in Winter v. R. (1986), 53 C.R. (3d) 372 (Alta. C.A.), dealing with in facie contempt.

[133] Supra, note 9 at 102. See also Atkey, supra, note 1 at 129; Coveney, supra, note 17 at 157; Martin, "Contempt of Court", supra, note 125 at 207. But see R. v. Western Printing &

Contempt of court is also criticized as being anachronistic in two senses. First, it is the only common-law offence which exists in Canada today, and it has been argued that this is inconsistent with the principle of legality[134]. Second, it is seen as anachronistic in that it is a remnant from an earlier time and society and is linked with the Divine Right of Kings and with autocratic power[135], particularly in relation to the classic summary procedure.

In relation to sub judice constructive contempt in particular, some commentators have criticized this area of law as being an overly restrictive limitation on the fundamental freedoms of expression and the media guaranteed under s. 2(b) of the Canadian Charter of Rights and Freedoms[136]. However, this criticism has received little judicial support. Indeed, Canadian courts have generally held that contempt of court is not an intolerable intrusion on freedom of expression and freedom of the media.

As well, the lessened mens rea requirement and the unavailability of defences based on a denial of mens rea are criticized and are seen as evidence of the very strict and unbending application of the sub judice rule in Canada. Indeed, the Canadian courts' application of this area of law is, in the words of one writer, "...the most mechanical application of the sub judice rule found anywhere in the Common Law world"[137].

There are as many proposals for reform of contempt of court as there are critics of it. The following discussion will focus on the wide variety of

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Publishing Ltd., supra, note 27, in which the court stated that what is and what is not contempt has been well settled by case law and can be precisely determined.

[134] Law Reform Commission, Report 17, supra, note 35 at 4; Fischer, supra, note 8 at 159; Martin, "Several Steps Backward", supra, note 125 at 310.

[135] Cavanaugh, supra, note 44 at 350-351.

[136] Martin, "Several Steps Backward", supra, note 125 at 314; Kersley, supra, note 125 at 50.

[137] Shifrin, supra, note 30 at 293.

measures for reform proposed by commentators, by the Law Reform Commission of Canada, and by Parliament.

B. GENERAL PROPOSALS FOR REFORM

Proposals by commentators have included codifying this area of law so as to provide precise definitions of contempt of court and to set out the procedure to be followed in dealing with an alleged contemnor[138]; supplementing the law of contempt of court with the establishment of a professional code for the media, which would set out press guidelines and establish internal controls[139]; and modifying contempt of court by allowing a limited defence of denial of mens rea in situations where the contemner had taken reasonable care and had neither knowledge of nor reason to suspect that proceedings were pending[140].

Indeed, some commentators have gone so far as to recommend abolishing all powers of contempt available to the courts, administrative bodies, and legislatures. In the words of one writer,

> Admittedly, the dangers possible under the present unlimited power are more potential than accurate. Nevertheless, if only for the sake of honesty and conscience, the contempt powers should be removed from the hands of the judiciary, despite the fact that they have on the whole so far served us well[141].

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[138] Coveney, supra, note 17 at 157, 163-164.

[139] E.U.Schrader, "Urges Professional Guidelines", in G. Parker, ed., Collision Course? Free Press and the Courts (Toronto: E.U. Schrader, 1966) at 22-27.

[140] Watkins, supra, note 6, at 143.

[141] Ibid. at 158. Other proposals for reform, such as providing a right of appeal and allowing for a ban on the reporting of evidence from preliminary inquiries, have already found their way into the Criminal Code.

C. THE LAW REFORM COMMISSION OF CANADA

Contempt of court has been considered in detail by the Law Reform Commission of Canada in its Working Paper 20: Contempt of Court[142] and in its subsequent Report 17: Contempt of Court[143]. These documents emphasized the need to retain contempt of court in general, and stressed, in relation to *sub judice* constructive contempt in particular, that the law must preserve the rule that an accused be tried only upon evidence presented during trial[144].

The Commission did, however, recognize the difficulties that exist with the present law of contempt of court, noting particularly that contempt of court is anachronistic and is inconsistent with the well-recognized principle of legality[145] and recommended reform by way of legislation. The Commission set out a draft of proposed legislation, which creates four types of contempt: disruption of judicial proceedings; defiance of judicial authority; affront to judicial authority; and interference with judicial proceedings. All four types are made indictable offences, with a maximum length of imprisonment of two years.

Interference with judicial proceedings is defined as attempting to obstruct, defeat or pervert pending judicial proceedings, or publishing or causing to be published anything the contemner knows or ought to know may interfere with the pending judicial proceedings. Negligence is thus made a basis of liability for contempt of court. "Pending" is defined, in relation to criminal trials, as from the time an information is laid or an indictment preferred until the time a verdict, order, or sentence is pronounced.

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[142] Supra, note 13.
[143] Supra, note 35.
[144] Ibid. at 15.
[145] Ibid. at 4.

The proposed legislation thus makes a number of significant changes to the existing law of contempt. For instance, it specifically sets out and defines four types of contempt; it makes no distinction between in facie and ex facie contempt; it defines "pending"; it provides a maximum penalty; and it limits the use of the summary procedure.

However, this proposal for reform has itself been criticized as being unsatisfactory, with one critic going so far as to state that "the general approach...is based on...a paranoid apprehension of both the motives of those who seek greater openness in our legal system and the likely results of such openness"[146]. This proposal has also been seen as imposing even greater restrictions on freedom of speech[147]; as making the categories of contempt too broad[148]; and as preserving a "lower" standard of procedural rigour for contempt offences than for other offences of comparable gravity"[149].

The Law Reform Commission of Canada has responded to some of these criticisms. Its latest recommendations relating to contempt of court are found in its Report 31: Recodifying Criminal Law[150], in which it sets out a draft of a new criminal code. Recommendations relating to contempt of court are set out in Division III: Obstructing Public Administration. In relation to sub judice constructive contempt in particular, ss.119 and 120 of this proposed code deal with publications in violation of a court order and with publications of prejudicial information[151].

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[146] Martin, "Several Steps Backward", supra, note 125 at 308.

[147] Ibid. at 312.

[148] Kersley, supra, note 125 at 41.

[149] Ibid. at 42.

[150] Law Reform Commission of Canada, Report 31: Recodifying Criminal Law (Ottawa: Law Reform Commission of Canada, 1987).

Pursuant to s.119, it is a crime to contravene a court order which prohibits publication of information identifying certain victims, witnesses, and confidential informants. It is also a crime to contravene a court order which prohibits the publication of information surrounding pre-trial motions, bail hearings, and preliminary inquiries; of information about a victim's sexual activity in a sexual crime case which is given at a hearing to determine the admissibility of such evidence; of information surrounding any portion of a trial at which the jury was not present if the jury is not sequestered; and of the contents of a court exhibit.

Pursuant to s.120, it is a crime to publish certain types of information while a civil or criminal trial is pending. Such information includes an accused's statement, a party's admission, an accused's criminal record, the results of any investigative test or procedure conducted in relation to the proceedings, psychological data about a party or the accused, and an opinion on the liability of a party or of the accused. Certain defences are also set out: publication of such information is not a crime where it does not jeopardize the fairness of the trial; where it is a fair and accurate report of the proceeding or of the contents of a court document that relates to the proceeding; or where it is part of a discussion in good faith of a matter of public interest and where any jeopardy that results to the fair trial is merely incidental to the discussion.

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[151] Report 31 does not set out the suggested punishment for these crimes. Instead, the Commission refers the reader to a previous report released by the Canadian Sentencing Commission entitled Sentencing Reform: A Canadian Approach (Ottawa: Minister of Supply and Services Canada, 1986). In the report, the Sentencing Commission recommends a sentence of one year for this type of offence.

Section 120 goes on to define "pending". A criminal trial is pending from the time when the public officer or prosecutor has reasonable grounds for initiating a criminal proceeding or from the time when compulsory process is issued, a charge is laid or an arrest is made, and remains pending until such time as a direction is given for the accused's discharge, the proceedings are stayed, a verdict is given, or the proceeding is otherwise determined by another formal or informal disposition.

These latest recommendations differ in some ways from the Commission's earlier recommendations. In particular, the categories of sub judice constructive contempt have been limited to certain specified types of publication. This is a very different approach from that taken in its earlier recommendations, in which it was made a crime to publish anything the contemner knows or ought to know may interfere with the pending judicial proceedings. This may be a recognition by the Commission that its earlier recommendation were a too-restrictive limit upon freedom of expression.

In other ways, however, these latest recommendations do not go as far as they could. In particular, these recommendations do not deal with the issue of the lessened mens rea that is required for sub judice constructive contempt convictions. As well, they do not deal with certain types of prejudicial publications which may affect an accused's fair trial, such as the publication of comments about an accused's character or background, the publication of photographs of an accused, and the publication of matters not admissible at trial. Since these types of publications are not made crimes under s.120 of the proposed code, the liability of those responsible for such publications is an open question.

D. PARLIAMENT

A major proposal for reform was made by Parliament in its omnibus Bill C-19, the Criminal Law Reform Act, 1984. This Bill abolished the common-law power of judges to punish for criminal contempt, and set out three contempt offences in s.33: Interference with Judicial Proceedings; Affront to Judicial Authority; and Disruption of Judicial Proceedings. Under this Bill, the offence of "Interference with Judicial Proceedings" is committed by

> Everyone who knowingly makes or causes to be made any publication that creates a substantial risk that the course of justice in any particular civil or criminal judicial proceeding which is pending at the time of the publication will be seriously impeded or prejudiced.

This proposed category of contempt resembles common-law sub judice constructive contempt to some extent, but modifies it by adding the word "knowingly", thus importing a further degree of mens rea than is required under the common law or under the Law Reform Commission of Canada's recommendations. As well, "pending" is defined more broadly than under the common law, but more narrowly than under the latest Law Reform Commission of Canada's recommendations. In relation to criminal proceedings, "pending" is defined as being from the moment of arrest without warrant, from the moment of issuance of an appearance notice, summons or warrant for arrest, or from the preferring of an indictment, until a verdict, sentence, or discontinuance has been rendered or the matter otherwise disposed of.

All three types of contempt are made hybrid offences with a maximum penalty of two years. The summary procedure is restricted to the offence of "Disruption of Judicial Proceedings", or in facie contempt. Where the summary procedure is followed, the Bill provides that the contemner is to be dealt with in a manner consistent with the rights to be presumed innocent and to make full answer and defence. The rights and safeguards afforded to a contemner who is dealt with by way of indictment are, presumably, those rights and safeguards afforded to an accused charged with any indictable offence under the Criminal Code.

The Bill also sets out two "good faith" defences which are very similar to the second and third defences set out in the Commission's Report 31. However, these defences in the Bill do not apply in the face of a lawful judicial order which prohibits or restricts publication.

These changes to the law of contempt of court were never incorporated into the law. The Bill received only a first reading on February 7, 1984, and was never passed. Instead, the Criminal Law Amendment Act, 1985 was passed the following year, which changed the law of contempt only by adding the words "discharged under s.662.1" to s.8 of the Criminal Code.

VII. CONCLUSION

Contempt of court is an area of law which has its roots in a time and society far removed from modern life. It developed at a time when autocratic power was unchallenged, the Divine Right of the Monarch was unquestioned, and the King was the fountain of all justice. Contempt of court was used to maintain the King's authority and dignity, and while it was initially dealt with by indictment and trial, it gradually came to be applied by the courts in a summary manner that was as autocratic and rigid as was the power and authority of the ruler applied by the King. In particular, the use of the summary procedure took away from the alleged contemner many of the rights and safeguards which had developed over the course of time and which were available to accused charged with other criminal offences.

The development of the criminal law in general has not been matched by a corresponding development in contempt of court law. As a result, this area of law has become somewhat anachronistic in modern society. For instance, the lessened requirement of mens rea and the uncertainty regarding the rights given to an alleged contemner are elements of this area of law which are clearly out of step and out of time with the rest of the criminal law.

Nowhere is this more clearly seen than in sub judice constructive contempt. This branch of contempt is a recent development in the law of contempt, arising at a time when the media has become increasingly active in the dissemination of information. Sub judice constructive contempt is thus a product of modern society. At the same time, however, its roots and its guiding principles are a product of a time and society very different from our own. As a result, the application of this ancient body of law in a modern setting creates difficulties and conflicts not easily resolved, and which are exacerbated by the relatively recent recognition in Canada of the competing fundamental rights of freedom of expression and the right to a fair trial[152].

Some commentators favor the media's right of freedom of expression over the accused's right to a fair trial. In the words of one writer, "the risks involved in limiting the right of the press to publicize the circumstances of judicial procedures are not outweighed by the individual rights involved"[153]. Critics who hold this opinion will have many criticisms of contempt of court, such as its vagueness, its lack of mens rea, and the arbitrariness of the summary procedure. Some of these criticisms are indeed justified.

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[152] However, M.D. Lepofsky states in Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (Toronto: Butterworth & Co. (Canada) Ltd., 1985) at 62, very little judicial attention has been paid to discussing freedom of expression and sub judice contempt in any meaningful way. Freedom of expression is instead speedily subordinated or summarily dismissed when a publication is considered to interfere with the administration of justice.

However, equally strong arguments can be made for limiting the rights of the media and favoring the rights of the accused in situations where judicial proceedings are sub judice. It is necessary only to look to the United States and its experience with "trial by newspaper" to recognize that the alternative, allowing the media virtually unlimited freedom in its reporting of sub judice legal proceedings, is unacceptable. As D.A. Schmeiser puts it when discussing contempt of court in the United States,

> In effect, the common law power to punish for contempt of court has been so whittled away that it now exists only for direct contempts in the face of the Court, leaving newspapers to roam unchecked[154].

To remove, or even to severely limit, the courts' power to punish sub judice constructive contempt is to remove or severely limit one of the major restraints on the media. Without this restraint, the media is left free to report what it chooses without regard for the rights of those about whom it reports. To argue that the media would, without this restraint, scrupulously and diligently consider the rights of an accused is naive.

Indeed, it is clear from the case law that this is merely wishful thinking. The early cases dealing with sub judice constructive contempt are full of optimistic statements about the media's ability to control itself and to act in a restrained manner when reporting on sub judice proceedings. For instance, in R. v. Hawken[155], which dealt with sub judice constructive contempt at a time when this branch of contempt was quite new, Farris, C.J.B.C., stated that

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[153] Kersley, supra, note 125 at 50. See also Martin, "Several Steps Backward", supra, note 125 at 311.

[154] Supra, note 32 at 227.

> I am sure, however, that nevertheless our newspapers have the highest interest of the community at heart, which must include the right of fair trial, and now that this matter [sub judice constructive contempt] has been brought to their attention there will be no need for further complaint in this or any similar case[156].

This optimism has clearly not been realized over the subsequent forty years. Even with the restraint of sub judice constructive contempt in place, there has been a continuing increase in the number of cases involving this type of contempt. This may be due to the combination of a sensation-hungry public and the media's highly competitive nature. In the words of one writer,

> Contempts on the part of persons not directly connected with actions being tried are perhaps increasing owing to rapidly changing conditions and the desire of news distributing agencies to satisfy the apparently insatiable craving of the public for sensationalism and result more from ignorance in attempting to make 'scoops' on their competitors than from any deliberate intention to interfere with orderly justice[157].

While this statement was made some fifty years ago, it remains as true today as it was then.

To remove the power of the courts to punish for constructive contempt and to favor freedom of expression over an accused's right to a fair trial would thus lead to a situation in which the accused's rights would be ignored by the media. As a result, in many cases the accused would be tried by a jury and judge who had been exposed to publicity based on extraneous, highly prejudicial, and often irrelevant evidence.

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[155] [1944] 2 D.L.R. 116 (B.C.S.C.).

[156] Ibid. at 119. See also Hatfield v. Healy, supra, note 62.

[157] His Honour U. McFadden, "Contempt of Court", [1937] 3 D.L.R. 385 at 393.

This is not acceptable. The accused's right to a fair trial must take precedence over the media's right of freedom of expression in situations where legal proceedings are *sub judice*. *Sub judice* constructive contempt must thus be retained, since it is one of the most important means by which an accused's rights are protected when they conflict with the media's rights.

However, *sub judice* constructive contempt must be modified to conform with the basic principles of criminal law and with the requirements of modern society. It should be codified by legislation and made an explicit part of the *Criminal Code*; definitions and procedures should be set out; and it should import a further degree of *mens rea* and allow for acquittal where the contemner did not know or suspect that proceedings were pending after having taken reasonable care to find out if they were pending[158]. As well, the summary procedure should be abolished, and *sub judice* constructive contempt should be dealt with by way of indictment and trial in accordance with the principles set out under the *Canadian Charter of Rights and Freedoms*, save for the right to be tried by jury.

These modifications to *sub judice* constructive contempt would preserve the right of the courts to punish this type of contempt, and would thus preserve the accused's right to a fair trial. They would also bring this branch of contempt into line with the rest of the criminal law, and would give to the alleged contemner the same rights and safeguards that are given to any other accused charged with a criminal offence.

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[158] The introduction of this defence would follow the English position. This defence is set out in s.3 of *The Contempt of Court Act 1981* (U.K.): see contempt of court discussion in Chapter 7, "The English Experience".

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CHAPTER 4

PROCEDURAL SAFEGUARDS

I. INTRODUCTION

The procedural safeguards provided by Canadian criminal law are a third important way of protecting the integrity of the trial process when it is threatened by pre-trial publicity[1]. As Wright puts it, "there are many safeguards built into the criminal trial process which are designed to ensure that neither judge nor jury is influenced by publicity surrounding a case"[2]. These safeguards operate to counter and minimize the effects of pre-trial publicity once it has reached the public.

Procedural safeguards are usually invoked when the trial is before a judge and jury, and are rarely used when there is no jury and the trial is before a judge alone. This is largely due to the fact that jurors are perceived as being more likely to be swayed by pre-trial publicity than are judges, who are considered to be "more rigorously trained to impartiality"[3]. As a result, these safeguards are relied upon in jury trials to ensure that the jury is impartial and has not been influenced by pre-trial publicity.

There are two broad categories of procedural safeguards: those relating to the conduct of the trial itself, and those relating to the selection and conduct of the jury. Safeguards relating to the trial include changes of venue; adjournments; the severance of trials of co-accused; mistrial proceedings; and the reversal of convictions on appeal. Safeguards relating to the jury include challenges to potential jurors; the juror's oath; sequestration of the jury; and the trial judge's instructions to the jury.

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[1] Law Reform Commission of Canada, Working Paper 56: Public and Media Access to the Criminal Process (Ottawa: Minister of Supply and Services Canada, 1987) at 30.

[2] C. Wright, "Issues of Law and Public Policy", in W. Tarnopolsky et al., eds., Newspapers and the Law, Royal Commission on Newspapers, Vol. 3 (Ottawa: Minister of Supply and Services Canada, 1981) at 62.

[3] R. v. McInroy (1915), 25 C.C.C. 49 (Alta. S.C.).

While each of these safeguards will be considered separately, it is important to remember that they are all interrelated. Pre-trial publicity may result in a change of venue application, in an adjournment application, and in challenges to prospective jurors on the basis of their lack of impartiality. On a broader scale, these safeguards are also interrelated with the other means that exist to ensure an accused's fair trial. Thus, pre-trial publicity may result in the use of prior restraints to prevent its publication, in contempt proceedings against the author of the publicity once it has been published, and in the use of procedural safeguards to counter the effects of the publicity. As well, some situations, the publicity may lead to defamation proceedings against its publisher and author[4].

While these procedural safeguards are thus an important means of protecting an accused's right to a fair trial, they are not perfect. In order to understand their defects, however, it is necessary to first understand the manner in which each safeguard operates to protect the integrity of the trial process. Thus, each safeguard and its particular defects will be discussed individually. The difficulties that exist in general with these safeguards will then be considered in relation to social science data and empirical evidence.

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[4] As is discussed in Chapter 5, "Defamation".

II. SAFEGUARDS RELATING TO THE CONDUCT OF THE TRIAL

A. INTRODUCTION

In relation to pre-trial publicity and the conduct of the trial, several procedural safeguards are available to protect the accused's right to a fair trial in the face of pre-trial publicity. In particular, the impact of pre-trial publicity upon the trial can be countered and minimized by changing the trial's location, by postponing the time of the trial, and by severing the trial of an accused from that of a co-accused where the co-accused has been the subject of extensive publicity. In some situations, a mistrial may be declared and a new jury empanelled, although this occurs mostly in the context of publicity during the trial rather than before the trial. As well, an accused's conviction can be reversed on appeal and a new trial ordered where that conviction amounts to a miscarriage of justice as a result of pre-trial publicity;

B. CHANGE OF VENUE

1. Introduction

Pursuant to s.599(1) of the Criminal Code,

> A court before which an accused is or may be indicted, at any term or sittings thereof, or a judge who may hold or sit in that court, may at any time before or after an indictment is found, upon the application of the prosecutor or the accused, order the trial to be held in a territorial division in the same province other than that in which the offence would otherwise be tried if
>
> (a) it appears expedient to the ends of justice...

Thus, a court can order that an accused's trial be moved from one location to another location within the same province when such a move is "expedient to the ends of justice". Although the Code does not define "expedient to the ends of justice", the courts have given this phrase a broad interpretation and have ordered changes of venue in a wide variety of circumstances. For instance, lack of proper courtroom facilities in the original judicial district has been considered sufficient grounds on which to order a change of venue[5]. Likewise, the venue of a trial has been changed in situations where holding the trial in the original venue would cause such great hardship to the accused as to deny him the right to a "full" trial, thus amounting to a denial of justice[6]. Most commonly, however, the venue of a trial is changed as a result of prejudicial pre-trial publicity.

2 Change of Venue due to Pre-Trial Publicity

(a) General principles

In cases involving pre-trial publicity, "expedient to the ends of justice" has been interpreted in terms of whether the publicity has made a fair and impartial trial in the original location impossible. The courts have stating this in varying ways. In R. v. Beaudry[7], for instance, Atkins, J., held that the test is whether the publicity has created a "fair and reasonable probability of partiality or prejudice"; if so, then it will be considered expedient to the ends of justice to move the trial to another venue. In R. v. Adams[8], the test was stated as being whether the publicity is so prejudicial that there can not be a "full and impartial trial". It should be noted that the trial must be fair and impartial in relation to the Crown as well as to the accused[9], and both the Crown and the accused can bring an application to have the venue changed.

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[5] See, for instance, R. v. Izzard (1971), 3 C.C.C. (2d) 270 (N.S.S.C.T.D.).

[6] See, for instance, R. v. Falkner (1978), 45 C.C.C. (2d) 146 (B.C. Co. Ct.); R. v. Ittoshat (1970), 10 C.R.N.S. 385 (Que. Sess.); R. v. Adams (1946), 86 C.C.C. 425 (Ont. H.C.). However, the accused's or the Crown's mere convenience is not a sufficient ground on which to order the venue changed: R. v. Spinthum (No. 1) (1913), 22 C.C.C. 483 (B.C.C.A.).

[7] [1966] 3 C.C.C. 51 (B.C.S.C.). This test has been used by several other courts. For example, see R. v. Kully (1973), 15 C.C.C. (2d) 488 (Ont. H.C.); R. v. DeBruge (1927), 47 C.C.C. 311 (Ont. S.C.); R. v. O'Gorman (1907), 12 C.C.C. 230 (Ont. H.C.). See also S.M. Robertson, Courts and the Media (Toronto: Butterworth & Co. (Canada) Ltd., 1981) at 214.

Regardless of how the test is worded, the case law is clear that the mere existence of pre-trial publicity is insufficient in itself to result in a change of venue. This is due to two factors. First, many courts have recognized that the rapid dissemination of news and information in modern society makes it almost impossible to avoid widespread publicity surrounding notorious or sensational cases. As Anderson, J., stated in R. v. Frederick,

> In a country and in an era in which the freedom of the press is jealously guarded and promoted and where anything deemed to be newsworthy is sure to be reported in the press, on the radio and on television, it must be anticipated and taken as the norm that any but the most commonplace homicide (if such there be) will receive publicity...[10]

Thus, a certain amount of publicity about many trials will be unavoidable in today's society.

Second, a very strong prima facie rule exists that trials should be held in the jurisdiction in which the offence was committed. This rule has been reiterated in numerous cases. In the words of Robertson, J.,

> ...there is no rule better established than that all causes shall be tried in the county where the crime is supposed to have been committed, and that the rule ought never to be infringed unless

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[8] Supra, note 6. Several other courts have followed this test. See, for instance, R. v. Bryant (1980), 54 C.C.C. (2d) 54 (Ont. H.C.).

[9] R. v. Wilson, [1983] 6 W.W.R. 361 (Sask. Q.B.).

[10] (1978), 41 C.C.C. (2d) 532 at 537 (Ont. H.C.).

> it plainly appears that a fair and impartial trial cannot be had in that county[11].

As a result of these two factors, the courts will not order a change of venue unless there is very clear evidence that the publicity surrounding the trial is so prejudicial and extensive that the trial will not be fair and impartial[12]. Further, it must also be shown that the publicity is so prejudicial and widespread that other procedural safeguards, such as the procedures used to select the jury and the juror's oath, will not be sufficient to ensure the trial's fairness and impartiality[13].

This is usually accomplished by affidavit evidence which establishes that extensive prejudicial publicity surrounds the trial. Affidavit evidence consisting merely of statements as to a general belief in the existence of such extensive publicity will not suffice. In R. v. Ponton[14], for instance, a great deal of publicity surrounded the accused's trial for break and enter. The Crown's application to change this trial's venue was supported by several affidavits attesting to a belief that the town was favorably disposed towards the accused. The court dismissed the application on the basis that there was insufficient evidence to justify breaching the prima facie rule and moving the trial to another location[15]. Thus, facts must be established that "satisfy the court's conscience" before it will move the trial to a new location[16].

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[11] R. v. Ponton (1898), 2 C.C.C. 192 at 197 (Ont. H.C.). This rule has been expressed in numerous Canadian cases: see, for instance, R. v. Turvey (1970), 1 C.C.C. (2d) 90 (N.S.S.C.T.D.); R. v. Bryant, supra, note 8; R. v. Vaillancourt (1973), 14 C.C.C. (2d) 136 (Ont. H. C.), aff'd (1974), 16 C.C.C. 137 (Ont. C.A.), aff'd o.g. (sub nom Vaillancourt v. R.) [1976] 1 S.C.R. 13; R. v. Dick, [1943] 1 D.L.R. 297 (Alta. S.C.); R. v. Coutts (1987), 56 Sask. R. 54 (Q.B.).

[12] As has been stated in many Canadian cases. See, for example, R. v. Alward (1976), 32 C.C.C. (2d) 416 (N.B.S.C.A.D.), aff'd o.g. (sub nom Alward v. R.) (1977), 35 C.C.C. (2d) 392 (S.C.C.); Deseve v. R. (1979), 9 C.R. (3d) 222 (Que. S.C.); R. v. Wilson, supra, note 9.

[13] In R. v. Morry (1970), 1 C.C.C. (2d) 498 (B.C.C.A.), for instance, the appeal court held that the prejudicial publicity had been adequately dealt with by the trial judge's instructions to the jury. Likewise, in R. v. Koyina, [1989] N.W.T.R. 337 (S.C.), the court refused to change a murder trial's venue on the basis that various procedural safeguards, such as the challenge for cause mechanism, the instructions to the jury, and the juror's oath, would ensure a fair trial. Similarly, in R. v. Collins (1989), 48 C.C.C. (3d) 343 (Ont. C.A.), the appeal court held, inter alia, that the trial judge had properly refused the accused's change of venue application and that the accused had been tried by an impartial jury, since the judge had allowed the accused to question prospective jurors on a challenge for cause without placing any restrictions on the questions asked of the jurors.

[14] Supra, note 11.

Whether the court's conscience is indeed satisfied is a matter that is within the trial judge's discretion. The case law is clear that this discretion is to be exercised judicially and cautiously, and only upon very strong grounds[17]. As a result, change of venue applications are rarely successful[18]. Further, the exercise of the trial judge's discretion is not appealable unless it results in an abuse or is improperly exercised[19]. For the most part, then, the trial judge's decision as to whether to order a change of venue is final.

(b) Specific factors resulting in successful change of venue applications

It is clear that each change of venue application must be considered in light of its own circumstances and in light of the general principles discussed above. However, a study of the case law reveals that certain factors often, although not invariably, lead to successful applications.

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[15] The trial thus went ahead in the original location. However, there was a near-riot at the end of the trial, and a new trial was ordered. The Crown's application for a change of venue of this trial was successful, the court finding that this near-riot, which resulted in threats to the Judge and to journalists and which lead to the reading of the Riot Act, was sufficient evidence establishing that a fair and impartial trial could not be held in that county: R. v. Ponton (No. 2) (1899), 2 C.C.C. 417 (Ont. H.C.).

[16] R. v. Bronfman (1930), 53 C.C.C. 32 (Sask. K.B.); R. v. Adams, supra, note 6; R. v. Harris (1762), 97 E.R. 858 (K.B.); R. v. Dick, supra, note 11.

[17] This requirement has been reiterated in numerous cases, as in, for instance, R. v. Turvey, supra, note 11; R. v. Martin, [1964] 2 C.C.C. 391(Sask. Q.B.); R. v. Bryant, supra, note 8; R. v. Fatt (1986), 30 C.C.C. (3d) 69 (N.W.T.S.C.); R. v. Graves et al. (1912), 5 D.L.R. 475 (N.S.S.C.).

[18] Particularly since trial judges rely heavily upon the often-illusory protection of other procedural safeguards and upon the "short memories of the public" in relation to the details of the publicity: see, for instance, R. v. Vaillancourt, supra, note 11; R. v. Jansen, [1976] 4 W.W.R. 277 (B.C.S.C.); R. v. Beaudry, supra, note 7; R. v. Adams, supra, note 6.

[19] R. v. Wilson, supra, note 9; Deseve v. R., supra, note 12; R. v. Sankey (1927), 49 C.C.C. 195 (B.C.C.A.).

First, the pre-trial publication of a statement or confession allegedly made by an accused often results in a change of venue, since such a confession or admission is by its very nature highly prejudicial to an accused[20]. This was the case in R. v. Upton[21], in which statements purportedly signed by the accused were widely publicized, although they were not yet admissible. His change of venue application was successful.

Second, the establishment by the community of a fund for the benefit of the accused or his or her victim is an important factor in a change of venue application, for it is often seen as tangible evidence of local sentiment about the trial and those involved in it which is inconsistent with the principle of impartiality. Thus, in R. v. Frederick[22], the founding of a trust fund for the family of a police officer killed by the accused was a very significant factor in the court's decision to change the venue of the trial. In most cases, however, the existence of such a fund by itself without other evidence of partiality will be insufficient to change the trial's venue[23].

A third factor which often leads to a successful change of venue application is the presence of extensive and widespread prejudicial publicity surrounding a trial or an accused. In R. v. Frederick[24], for instance, the media covered in "loving and lachrymose detail" all the events surrounding the shooting of the police officer; the police officer's virtues; his long connection with the area; the plight of his widow and children; the founding of a trust fund for his family; his funeral, which was attended by 3,000 people, including 500 police officers; and the surge of public opinion in the area for the reinstatement of capital punishment. As well, there was widespread publicity concerning the accused's criminal record and the fact that he had been unlawfully at large at the time of the shooting. The nature and extent of this publicity led the court to grant the change of venue application[25].

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[20] As was discussed in relation to contempt proceedings: see the discussion in Chapter 3, "Contempt of Court".

[21] (1922), 37 C.C.C. 15 (Ont. S.C.). See also The Honourable R.E. Salhany, Canadian Criminal Procedure, 4th ed. (Aurora, Ontario: Canada Law Book Inc., 1984) at 37. Likewise, the pre-trial publication of an accused's criminal record may be a ground for a successful change of venue application: R. v. Kully, supra, note 7.

[22] Supra, note 10. See also R. v. Martin, supra, note 17. But see Fitzgerald v. R. (1981), 23 C.R. (3d) 163 (Ont. S.C.) and R. v. Wilson, supra, note 9, in which the courts held that the presence of other safeguards adequately dealt with the danger posed by the fund.

[23] R. v. Wilson, ibid.

[24] Supra, note 10.

Fourth, publication of the details of a change of venue application may lead to a successful subsequent change of venue application. The courts often ban reporting on a change of venue application and its outcome until after the completion of the trial itself[26]. In some situations, publication in breach of such a ban may be sufficient grounds on which to order a change of venue. This was the case in R. v. Fosbraey[27] in which the initial change of venue application and its dismissal were publicized in breach of a court ban on such publicity. The accused brought a subsequent change of venue application which was granted, Spence, J. stating that

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[25] Likewise, in R. v. Charest (1990), 76 C.R. (3d) 63 (Que. C.A.), the court held that the accused's new trial should be moved to a new location, since evidence indicated intense local hostility to the accused as a result of extensive prejudicial pre-trial publicity. Indeed, sympathy for the victim was so widespread that the municipal arena was renamed after the victim in honor of the victim's memory. See also R. v. Talbot (1977), 38 C.C.C. (2d) 555 (Ont. H.C.); Boucher v. R. (1954), 110 C.C.C. 263 (S.C.C.). But see Fitzgerald v. R., supra, note 22, in which the massive publicity was not sufficiently prejudicial to the accused as to warrant a change of venue.

[26] See, for instance, R. v. Alward, supra, note 12; Re Trusz and R. (1974), 20 C.C.C. (2d) 239 (Ont. H.C.); R. v. Jansen, supra, note 18. Such bans have been held not to violate the Canadian Charter of Rights and Freedoms in relation to the guarantee of freedom of the press: Re Southam Inc. and R. (No. 2) (1982), 70 C.C.C. (2d) 264 (Ont. H.C.); R. v. C.R.B. (1982), 30 C.R. (3d) 80 (Ont. H.C.). This is discussed in more depth in Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests, and Preliminary Inquiries".

[27] (1950), 98 C.C.C. 275 (Ont. H.C.)

> I cannot...imagine a more probable cause of prejudice in a juryman than for him to learn that the accused had so mistrusted the fairness of him and the other citizens of the county that he had vainly attempted to have the trial taken out of the county[28].

In most cases, however, such publication is not in itself sufficient grounds for a change of venue. Additional factors must usually be present before the court will exercise its discretion and order the venue changed[29].

Fifth, if the original venue of a trial is changed and the prejudice or partiality causing its change subsequently vanishes, its disappearance may be sufficient grounds on which to order the trial changed back to its original venue. In such a case, the prima facie rule will prevail, and the trial will be held in the jurisdiction in which the offence was committed[30]. It should be noted that the grounds in support of such a subsequent application need not be as strong as are required for an initial application[31].

A sixth important factor in a change of venue application is the size of the community in which the trial is to be held, since "...what may indicate a probability of prejudice or partiality in a small community is not necessarily the same as a probability of such partiality or prejudice in a large community"[32]. For instance, in a very small community where both the accused and the victim are related to many community members and where there are only 200 eligible jurors, the probability of partiality is much higher than it would be if the trial were held in a large city. The trial will thus be moved from that small community to a larger, more distant centre[33].

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[28] Ibid. at 277.

[29] R. v. Nicholas (1986), 59 Nfld. & P.E.I.R. 269 (Nfld. S.C.T.D.).

[30] R. v. Kellar (1973), 24 C.R.N.S. 71 (Ont. Co. Ct.).

[31] Ibid. It should also be noted that these subsequent applications are heard de novo and not as appeals from the initial application: R. v. Hutchison (1975), 26 C.C.C. (2d) 423 (N.B.S.C.A.D.), aff'd on other grounds [1977] 2 S.C.R. 717.

[32] R. v. Miller (1979), 12 C.R. (3d) 126 (Ont. H.C.), at 128.

Finally, the nature of the offence with which the accused is charged can be an important factor in a change of venue application. Certain crimes, such as sexual assault and the killing of police officers, may by their very nature arouse public feeling to such an extent that there is a fair and reasonable probability of local partiality[34] . However, the presence of this factor alone may not be sufficient grounds on which to found a change of venue application[35]. Indeed, one court has even gone so far as to deny any connection between the nature of the offence and the existence of public animosity and prejudice against the offenders[36].

(c) Difficulties with change of venue as a procedural safeguard

Although change of venue is one of the most important procedural safeguards protecting the trial process from the effects of prejudicial pre-trial publicity, two major difficulties exist with this safeguard. First, when considering change of venue applications, the courts rely heavily upon the availability of other procedural safeguards as being sufficient ways of dealing with the publicity. As Thompson, J., put it in R. v. Vaillancourt[37] when dismissing the accused's change of venue application,

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[33] R. v. Lafferty (1977), 35 C.C.C. 183 (N.W.T.S.C.). See also R. v. Fatt, supra, note 17. But see R. v. Chinna, [1990] N.W.T.R. 1 (S.C.), where the court refused to move the trial from a small community of 700 people to a larger community on the basis that there was no evidence or suggestion of a reasonable probability of prejudice.

[34] R. v. Frederick, supra, note 10; R. v Beaudry, supra, note 7.

[35] R. v. Turvey, supra, note 11.

[36] McLaurin, J., stated in R. v. Dick, supra, note 11, that the accused, who was charged with buggery, was not in danger of receiving unfair treatment simply because the public has a "natural and violent loathing" of the alleged offence and a "repugnance for the alleged depraved individuals".

> I think that the provisions of the Criminal Code which undoubtedly have been carved out of wide experience and over some long period of time in matters relating to criminal law and criminal procedure are ample to protect against any infringements which might appear from the material before me in so far as the trial of this case is concerned.

As a result, changes of venue will be ordered only in extreme cases where other safeguards are not sufficient to guarantee a fair trial. However, until recently there has been little objective study of the efficacy of these other safeguards. Indeed, recent empirical evidence has tended to discount the effectiveness of some of these safeguards[38]. Such unquestioning judicial reliance upon these safeguards may thus provide only illusory protection for the rights of the accused and the Crown to a fair and impartial trial.

Second, there is some question as to the effectiveness and availability of the change of venue itself. When a change of venue is ordered, the trial must be moved to a location which is relatively free from the prejudicial publicity in question. However, in this era of rapid news dissemination, it may be very difficult to find a location in the province which is free from publicity, particularly when the trial is very notorious and sensational. As Kesterton sums it up, the effectiveness of the change of venue is limited

> ...by the fact that it is only the minor crimes which do not get bruited about by the omnipresent media from community to community. Communities are no longer so isolated that a change of venue is apt to provide the remedy sought[39].

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[37] Supra, note 11 at 138. See also R. v. Jansen, supra, note 18; Fitzgerald v. R., supra, note 22; R. v. Wilson, supra, note 9.

[38] As is discussed below in relation to the use of social science data.

[39] W.H. Kesterton, The Law and the Press in Canada (Toronto: McLelland & Stewart Limited, 1976) at 23.

Ironically, then, the trials most in need of a change of venue because they have attracted much pre-trial publicity will be the most difficult to move precisely because of this publicity, especially when the publicity has permeated the entire province[40]. In such cases, the trials will remain in their original venues, even though the trials may very well be neither fair nor impartial.

C. ADJOURNMENT

A second important way of countering the effects of pre-trial publicity is to adjourn the trial to some future date. Thus, the trial remains in its original venue but is moved in time. As Beckton states,

> ...when a judge feels that the publicity surrounding a pending trial has been extreme and emotions are so high, he may indefinitely postpone the commencement of the trial until he feels that the publicity has abated sufficiently to allow the accused to receive a fair trial[41].

Several provisions in the Criminal Code give a judge broad powers of adjournment. In particular, s.571 of the Code, which deals with indictable offences and trial without a jury, provides that

> A judge or provincial court acting under this Part [Part XIX] may from time to time adjourn a trial until it is finally terminated.

Likewise, s.645(l), (2), and (3) of the Code, which deal with jury trial procedures, provide that

> (l) The trial of an accused shall proceed continuously subject to adjournment by the court.

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[40] Particularly in light of the fact that the venue of a trial cannot be changed to an entirely different province which would be free from the publicity: s.599(l) of the Code limits changes of venue to within the original province. See also R. v. Threinen (1976), 30 C.C.C. (2d) 42 (Sask. Q.B.).

[41] C.F. Beckton, The Law and the Media in Canada (Toronto: The Carswell Company Limited, 1982) at 74.

(2) The judge may adjourn the trial from time to time in the same sittings.

(3) No formal adjournment of trial or entry thereof is required.

This section does not set any restriction on the length of the adjournment. In situations where a trial is adjourned as a result of pre-trial publicity, a judge can postpone the trial for as long as he or she thinks is necessary to allow the publicity to abate.

Although the Code is silent as to the test used in determining whether an adjournment is necessary in cases involving pre-trial publicity, the case law is clear that the principles that apply to change of venue applications also apply to adjournment applications[42]. In other words, the test used in deciding whether to adjourn the trial is the same as is used in deciding whether to change the venue of the trial: has the publicity created a reasonable probability of partiality and prejudice such that the accused will not be able to receive a fair and impartial trial?[43]

In deciding whether this test has been met, the court will look at each case on an individual basis and will consider factors such as the nature and extent of the publicity. In addition, the court will consider whether other procedural safeguards will sufficiently protect the fairness of the trial so that an adjournment is unnecessary. If so, the application for an adjournment will be dismissed. This was the situation in R. v. Robertson[44], wherein the trial judge dismissed an adjournment application on the basis that

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[42] R. v. Robertson (1962), 39 C.R. 162 (B.C.S.C.).

[43] R. v. Commisso (1979), 10 C.R. (3d) 191 (B.C.S.C.).

[44] Supra, note 42, at 171. See also R. v. Botelho (April 3, 1979) (Ont. Co. Ct.) [unreported], as discussed in Robertson, supra, note 7 at Appendix J. If, of course, the other safeguards are insufficient protection, then the application will be successful and the trial will be adjourned: R. v. Willis (1913), 9 D.L.R. 646 (Man. K.B.).

> It should not be overlooked that on this indictment each of the accused has 12 peremptory challenges and an unlimited number of challenges for cause. This right...should prevent any possibility of any juror being empanelled who had formed an opinion prejudicial to the accused.

As with change of venue applications, several difficulties exist with adjournment applications. First, the courts' unquestioning reliance upon the efficacy of other procedural safeguards when considering adjournment applications is suspect, for there is no empirical evidence establishing that these other safeguards are indeed effective ways of dealing with pre-trial publicity. Second, postponing a sensational trial until its surrounding publicity subsides may be of limited value, since excessive media coverage may have already tainted the public's mind[45]. Third, while the publicity may subside during the period of adjournment, interest in the case is likely to revive once it is up again for trial[46]. Fourth, it is very difficult to determine in a particular case how long it will take for the publicity and its effects to abate, assuming that the passage of time will indeed dampen the effects of the publicity, and to thus determine for how long the trial should be postponed. Thus, adjournment is at best an imperfect solution to the problem of ensuring the fairness of a trial.

D. SEVERANCE

The court's ability to sever the trial of one accused from that of a co-accused is a third means by which the integrity of the trial process may be protected in the fact of pre-trial publicity. Specifically, severance can be used to shield an accused from the effects of adverse publicity surrounding a co-accused[47].

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[45] Kesterton, supra, note 39 at 23.

[46] Ibid.

At common law, a strong presumption exists that individuals jointly indicted should be jointly tried. The classic statement of this is found in Re Grondkowski and Malinowski[48], wherein the Lord Chief Justice stated that

> Prima facie it appears to the Court that, where the essence of the case is that the prisoners were engaged on a common enterprise, it is obviously right and proper that they should be jointly indicted and jointly tried...

This has been reiterated in numerous Canadian cases[49].

However, this presumption is not a rigid rule. In certain cases, the joint trials of those jointly indicted will indeed be separated. This has usually been allowed on the grounds

(1) that the defendants have antagonistic defences;

(2) that important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial;

(3) that evidence which is incompetent against one defendant, is to be introduced against another, and that it would work prejudicially to the former with the jury;

(4) that a confession made by one of the defendants, if introduced and proved, would be calculated to prejudice the jury against the other defendants; and

(5) that one of the defendants could give evidence for the whole or some of the other defendants and would become a competent and compellable witness on the separate trials

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[47] Ibid.

[48] (1946), 31 Cr. App. R. 116 (C.A.) at 119.

[49] See, for instance, R. v. Weir (No. 4) (1889), 3 C.C.C. 351 (Que. Q.B.); R. v. Vaas (1982), 30 C.R. (3d) 277 (Alta. Q.B.); R. v. Agawa (1975), 31 C.R.N.S. 293 (Ont. C.A.); R. v. McLeod (1983), 6 C.C.C. (3d) 29 (Ont. C.A). See also Salhany, supra, note 21 at 236-7; A.O. Klein, "Trial of Accused Persons Together", in Law Society of Upper Canada, Jury Trials (1959) 15.

of such other defendants[50].

While these are the usual grounds on which a joint trial may be severed, they are not the only grounds. Pursuant to s.591(3) of the Code,

> The court may, where it is satisfied that interests of justice so require, order...
>
> (b) where there is more than one accused or defendant, that one or more of them be tried separately on one or more of the counts.

Therefore, severance can be ordered whenever it is required by the "interests of justice".

Although the Code does not define "interests of justice", the courts have interpreted this phrase in terms of fairness towards the accused applying for the severance. The question is thus whether an accused who seeks severance of his or her trial could be fairly tried if severance was not granted[51]. "Interests of justice" has also been interpreted in terms of injustice towards the accused seeking the severance. As Vamplew puts it, "...the overriding principle, rule or discretionary power is governed by whether or not an imbalance or injustice may be caused towards one or more of the accused"[52].

In cases involving pre-trial publicity surrounding a co-accused, an accused jointly indicted with the co-accused can seek to have his or her trial severed from that of the co-accused on the basis that severance is required in the ends of justice, since the pre-trial publicity surrounding his or her co-accused taints the accused by association in the public's mind and will thus prevent the accused from having a fair trial. As one commentator states, "...a joint trial always creates the risk that the jury may find it difficult not to be prejudiced against an accused who is associated with others whom they may be intending to convict"[53]. Clearly, this risk is magnified when the jurors, as members of the public, have been exposed to prejudicial pre-trial publicity concerning one of the co-accused.

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[50] As set out in the leading case of R. v. Weir (No. 4), supra, note 49 at 352-3. Weir has been cited in numerous cases and is seen as the basic authority on the usual grounds of severance of joint trials: J.L.K. Vamplew, "Joint Trials?" (1969-70) 12 Crim. L. Q. 30.

[51] R. v. Emkeit (1971), 3 C.C.C. (2d) 309 (Alta. S.C.A.D.).

[52] Supra, note 50 at 36.

An accused who is tainted by publicity surrounding a co-accused would thus be well advised to apply to the trial judge at the very beginning of the trial to have his or her trial severed from that of the co-accused[54]. In order to guard against the effects of further publicity resulting from the severance application, the accused bringing the application should also seek a ban on publicity surrounding the application and the judge's decision[55].

The decision as to whether to sever the joint trials of one or more accused is solely within the trial judge's judicially-exercised discretion[56]. Thus, the only means of appealing the judge's decision not to sever is to show that he or she did not act judicially or to show that a miscarriage of justice resulted from the trials being held jointly rather than separately[57]. In practice, then, the trial judge's decision as to whether to sever joint trials is usually final.

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[53] Salhany, supra, note 21 at 328.

[54] Indeed, the application should always be made at the start of the trial: Salhany, supra, note 21 at 238; R. v. Cassidy, [1963] 2 C.C.C. 219 (Alta. S.C.A.D.). The application cannot be made earlier, at the preliminary hearing: Re Poitras, Shaw and Long and R. (1976), 32 C.C.C. (2d) 184 (Man Q.B.). As well, there is no reason why the Crown could not bring a severance application in a situation where there is much sympathetic publicity towards one of the co-accused which may influence the jury in favor of the other accused, although this is less likely. While the Code is silent as to the procedure to be followed on such a severance application, it appears that in practice such an application is analogous to and is conducted in the same manner as an application to separate counts in an indictment: Klein, supra, note 49 at 19.

[55] As was ordered in R. v. Lane, [1970] 1 C.C.C. 196 (Ont. H.C.).

[56] R. v. Jefferson (1971), 6 C.C.C. (2d) 33 (Ont. H.C.); R. v. Kestenberg (1959), 126 C.C.C. 387 (Ont. C.A.); R. v. Agawa, supra, note 49.

[57] R. v. McLeod, supra, note 49; R. v. Cassidy, supra, note 54; R. v. Quiring (1974), 19 C.C.C. (2d) 337 (Sask. C.A.) (leave to app. ref. 28 C.R.N.S. 128*n*); R. v. MacDonald, [1965] 3 C.C.C. 332 (N.B.S.C.A.D.); R. v. MacPherson [1964] 3 C.C.C. 170 (Ont. C.A.).

While severance usually occurs as a result of an accused's application and a judge's order, severance may also occur involuntarily, without an accused's application and without a trial judge's order, in situations where the publicity surrounding the co-accused is so great that the co-accused's trial is moved to a different venue. The change of venue would necessarily lead to a severance of the joint trials, unless the Crown simultaneously or subsequently sought a change of venue for the trial of the other accused[58].

It should be noted that as a result of this strong presumption in favor of the joint trials of those jointly indicted, motions to sever are rarely granted[59]. Indeed, few Canadian decisions have allowed severance in cases involving extensive pre-trial publicity[60], although there is no reason in theory why severance in such circumstances could not be ordered.

Where severance does occur, however, it is only an imperfect solution to the problem of protecting the integrity of the trial process and ensuring the accused's right to a fair trial. Severance does not ensure the fair trial of the co-accused about whom the publicity was initially generated, and the co-accused will have to rely on other procedural safeguards to preserve his or her right to a fair trial. Further, severance is likely to be ordered only where there has been extensive prejudicial pre-trial publicity about one of the accused.

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[58] A.D. Gold, "Annotation: Change of Venue Upon a Joint Charge" (1975), 31 C.R.N.S. 77 at 78.

[59] A. Manson, "Annotation" (1982), 30 C.R. (3d) 277 at 278.

[60] Indeed, there appears to be only one decision in which severance was allowed as a result of extensive publicity. In R. v. Rush, an unreported 1969 decision of the Ontario Court of Appeal discussed in Vamplew, supra, note 50 at 41, one of the accused, a solicitor with a clean record, was allowed to have his trial severed from that of his co-accused, about whom there had been a great deal of publicity concerning his nefarious dealings and the underworld's attempts on his life.

However, such publicity may leave so great and immediate impression on the minds of the public that severance alone will not be enough to protect the other accused who are tainted by such publicity.

E. MISTRIALS

The fourth procedural safeguard relating to the conduct of the trial is the trial judge's ability to declare a mistrial during the trial. A mistrial results when for some reason the entire jury must be discharged and the trial must be reheard by a new jury. This often occurs when the jury is exposed to inadmissible evidence which is of such a nature or an extent that the jury is no longer able to approach the case impartially and can not help but be prejudiced by it[61]. For instance, the premature publication of the accuseds' criminal records during their trial may lead to a mistrial being declared due to the prejudicial effect of this information on the jury[62].

The decision as to whether to call a mistrial or let the trial continue in the face of prejudicial publicity is within the trial judge's discretion. This discretion stems from English common-law[63], for the Criminal Code does not specifically authorize the trial judge to declare a mistrial and discharge the jury in these circumstances.

In deciding whether to exercise this discretion, the trial judge will consider whether the accused's right to a fair trial can be adequately protected by the other procedural safeguards. In R. v. Bengert (No. 4)[64], for instance, a radio broadcast stated that the accused had planned to travel to Costa Rica to avoid arrest, that his refusal to hire a lawyer was a tactic designed to confuse the trial, and that he was a leading underworld figure. In dismissing the accused's mistrial application, the court held that the issue was whether the accused could, in light of the publicity, obtain a fair trial before the jury. In this case, the court felt that the accused could indeed obtain a fair trial because the jurors were capable of disregarding information heard outside of the court. As Berger, J. stated,

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[61] A. Gold, "The Jury in the Criminal Trial", in V. M. Del Buono, ed., Criminal Procedure in Canada (Toronto: Butterworth & Co. (Canada) Ltd., 1982) 381 at 401; R. v. Ambrose (1975), 25 C.C.C. (2d) 90 (N.B.C.A.), aff'd [1977] 2 S.C.R. 717.

[62] A.G. for Manitoba v. Winnipeg Free Press Co. Ltd., [1965] 4 C.C.C. 260 (Man. Q.B.). However, it is not clear whether publicity favourable to the accused and which is created by the accused himself or herself will allow the Crown to seek a mistrial in the same way that publicity negative to the accused will allow the accused to seek a mistrial. This question was raised but not answered in R. v. Morgentaler (1976), 27 C.C.C. (2d) 81 (Que. C.A.).

[63] R. v. Bengert (No. 14) (1980), 15 C.R. (3d) 114 (B.C.C.A.).

> ...I do not think that these broadcasts have so far created an atmosphere in which 12 citizens sworn to try the case fairly on the evidence brought before them in this court cannot be relied upon to live up to their oath[65].

Thus, the court felt that the jurors' oath was sufficient to protect the accused's right to a fair trial. The court also stressed that the trial judge's instructions to the jury to try the accused solely on the evidence presented in court and to disregard information heard elsewhere would help protect this right.

Although a mistrial is usually considered in the context of prejudicial information published during trial, pre-trial publicity may still be relevant when asking for a mistrial if its presence, together with the presence of publicity during trial, has had a cumulative effect upon the jurors such that they can no longer remain impartial. On at least one occasion, the court has considered the cumulative effect of previous publicity during the trial together with fresh publicity during the same trial[66]. There appears to be no reason why pre-trial publicity could not be considered in a similar manner.

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[64] (1978), 15 C.R. (3d) 16 (B.C.S.C.).

[65] Ibid. at 21. See also R. v. Bengert (No. 1) (1978), 15 C.R. (3d) 1 (B.C.S.C.); R. v. Dubois (1987), 83 A.R. 161 (C.A.). But see R. v. Vermette (1982), 30 C.R. (3d) 129 (Que. S.C.), where massive prejudicial publicity during trial resulted in a mistrial and, eventually, in a stay of proceedings. The court reached this decision on the basis that the ordinary procedural safeguards would have been ineffective in this case to ensure the accused's right to a fair trial.

It should be noted, however, that mistrial applications rarely succeed. This may be largely due to judicial reluctance to declare a mistrial given the expense, delay, and inconvenience involved. Instead, the courts prefer to rely on the availability of other procedural safeguards to ensure the jury's impartiality[67].

F. OVERTURNING OF CONVICTIONS ON APPEAL

In some situations, an accused who has been convicted may be able to have his or her conviction overturned and a new trial ordered on appeal. For instance, if the accused sought a mistrial during the course of the original trial which the trial judge refused to grant, the accused's conviction might be overturned on appeal on the grounds that the trial judge erred in not ordering a mistrial. However, while the appeal court will review this exercise of the trial judge's discretion, it will not lightly interfere with it[68]. Indeed, the appeal court will not overturn the conviction unless there has been a miscarriage of justice due to the trial judge's refusal to order a mistrial or due to the presence of extensive prejudicial pre-trial or trial publicity in general. In order to establish such a miscarriage of justice, the accused must show that the jurors had knowledge of the publicity in question and were so influenced by it that their verdict was affected[69]. In Canada, there appear to be no cases in which an accused has been able to have his or her conviction overturned and a new trial ordered in such circumstances.

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[66] R. v. Bengert (No. 4), supra, note 64.

[67] As Gold states, in "The Jury in the Criminal Trial", supra, note 61 at 405, "...the trial judge can allow the case to proceed as a matter of expedience if a verdict for the aggrieved party is still a distinct possibility with proper directions in the charge".

[68] R. v. Bengert (No. 14), supra, note 63.

[69] R. v. Demeter (1975), 25 C.C.C. (2d) 417 (Ont. C.A.), aff'd (1977), 34 C.C.C. (2d) 137 (S.C.C.). However, in R. v. Duke (1986), 22 C.C.C. (3d) 217 (Alta. C.A.), the court overturned the accused's conviction on the basis that information adduced during trial

The use of this power to overturn convictions and order new trials on appeal has been relied upon by many American courts as a sort of ultimate cure for the problems created by pre-trial publicity[70]. Indeed, the American reliance on this safeguard has been praised by several Canadian commentators, who have criticized the Canadian judiciary's unwillingness to overturn convictions as demonstrating a "lukewarm attitude" to the accused's fair trial interest[71]. However, reliance on this power as a means of protecting an accused's right to a fair trial creates far more problems and produces far more injustices than it cures. The use of this safeguard is expensive and time-consuming. If a long time has passed between the original trial and the new trial, witnesses may have died or may be impossible to locate; memories may have faded; and evidence may have been lost or destroyed, thus affecting the conduct of the new trial. Further, even if the accused is acquitted at the new trial, he or she will have been unnecessarily deprived of his or her liberty during the time between the first and second trial, and his or her life will have been permanently and irrevocably changed. Those who assert the desirability of this safeguard as a means of protecting an accused's right to a fair trial appear to ignore these practical concerns.

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as to the accused's character created an unshakeable appearance of an unfair adjudicative process even though it could not be proved or refuted that this information had an effect on the jury's verdict.

[70] As is discussed in Chapter 6, "The American Experience".

[71] See, for instance, M.D. Lepofsky, Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (Toronto: Butterworth & Co. (Canada) Ltd., 1985) at 105.

III. SAFEGUARDS RELATING TO THE TRIERS OF FACT

A. INTRODUCTION

The preceding discussion has focused on those safeguards relating to the conduct of the trial. Other safeguards are available which relate to the selection and conduct of the triers of fact, the jurors. Because the jury plays such an important role in the modern criminal justice system, acting as the conscience of the community, as an educative instrument, as the citizen's ultimate protection against oppressive laws, and most significantly as a fact-finder[72], it is essential that the jurors carry out their functions impartially. Indeed, the very nature of these functions presupposes that the jurors are selected at random from a fair cross-section of the community and that they are impartial.

The random selection of jurors from a fair cross-section of the community is assured through the procedures in the Code dealing with the selection of the panel[73]. The jurors' impartiality is assured through a variety of procedural safeguards dealing with the selection and conduct of the individual jurors. In particular, the jurors' impartiality is assured through the process of challenging the jurors during the selection process; through the oath each juror swears; through sequestration of the jury; and through the trial judge's instructions to the jury. These procedural safeguards are intended to ensure the jury is impartial. They are not intended to ensure that it is favourable[74].

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[72] These functions of the jury are discussed fully by the Law Reform Commission of Canada, in Working Paper 27: The Jury in Criminal Trials (Ottawa: Minister of Supply and Services Canada, 1980) at 1-19.

[73] Criminal Code, ss.626, 627, 629, 630, 631, 632, 642, and 643.

[74] R. v. Makow (1974), 28 C.R.N.S. 87 (B.C.C.A.).

B. CHALLENGES TO THE JURORS

1. Introduction

The ability to challenge a juror, either peremptorily or for cause, is one of the most important ways of ensuring that he or she is impartial and has not been affected by pre-trial publicity surrounding the case and the accused. The challenge is not, however, intended to eliminate every prospective juror who has some knowledge of the trial. As the Court stated in R. v. Hubbert,

> In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence[75].

Pursuant to ss.633 and 634 of the Code, the accused and the Crown are each given a certain number of peremptory challenges, which are challenges that can be made to prevent a prospective juror from serving on the jury without having to state a specific reason or establish a cause for having the prospective juror so excluded[76]. Thus, an accused who feels that a prospective juror is somehow prejudiced against him or her or is not impartial can use a peremptory challenge to simply reject that juror.

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[75] (1975), 31 C.R.N.S. 27 at 39 (Ont. C.A.), aff'd (1977) 33 C.C.C. (3d) 207 (S.C.C.). See also R. v. Makow, supra, note 74 at 94; R. v. Sherratt (1989), 49 C.C.C. (3d) 237 (Man. C.A.), under app. to S.C.C., refusing to allow challenges for cause where there had been considerable pre-trial publicity as a result of police efforts to find the deceased's body following the accused's arrest

[76] The number of peremptory challenges given to the Crown and the accused differs, and depends upon the nature of the offence with which the accused is charged. The Crown, however, is also entitled to stand aside up to 48 jurors: the accused does not have a similar power. At least one case has held that this disparity between the Crown's rights and the accused's rights violates s.15 of the Charter: R. v. Byers (1987), 36 C.C.C. (3d) 86 (P.E.I.S.C.). Other courts have disagreed: see, for instance, La Chapelle v. R. (1988), 58 Alta. L.R. (2d) 93 (Q.B.).

More common in this situation, however, is the use of the challenge for cause as set out in s.638(1) of the Code, which provides that

> A prosecutor or an accused is entitled to any number of challenges on the ground that...
>
> (b) a juror is not indifferent between the Queen and the accused...

Thus, an accused who feels that a prospective juror is not impartial due to the juror's exposure to pre-trial publicity can challenge this juror on the grounds of lack of indifference. If successful, the prospective juror will not serve as a juror.

Although s.638 of the Code thus establishes the accused's and the Crown's right to challenge a juror on the basis of partiality, the Code is silent as to the procedure to be used in making a challenge for cause save to provide that the challenge may be required to be in writing and that it will be dealt with by the two jurors who were last sworn[77]. As a result of this lack of detail, there has been much debate over the procedure to be followed in challenging for cause, and, in particular, over three important issues.

2. Must Counsel give Particulars of the Challenge?

One of the most contentious issues surrounding the making of a challenge for cause is whether counsel making the challenge must give particulars of the challenge prior to questioning the prospective juror, or whether counsel may simply state that the challenge is for lack of indifference and then proceed to question the prospective juror. To put it another way, the issue is whether counsel must have independent, extrinsic evidence showing the juror's lack of impartiality before he or she questions the juror.

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[77] ss.639, 640.

American and English courts have taken different approaches to this issue. In the United States, counsel is allowed to ask the juror a wide variety of questions before deciding whether to challenge the juror for lack of impartiality[78]. The answers to these questions will determine whether or not the juror is challenged for lack of impartiality. In England, by contrast, particulars must be given and a foundation for the challenge must be laid before counsel is able to question a prospective juror[79].

In Canada, the courts have wavered between these two extremes. Many courts have favoured the English approach and have held that counsel must establish at least a prima facie case that the prospective juror is not impartial before being able to directly challenge the juror for cause[80]. This can be done by bringing forward witnesses who know the juror and his or her attitudes towards the case and the accused, or who know of anything the juror has done or said which indicate partiality[81].

Other courts have adopted an approach closer to that of the United States and have held that neither particulars nor extrinsic evidence need be provided prior to challenging a prospective juror for cause[82]. This approach is based on the contents of Form 41 of the Code, which is the usual manner by which a challenge for cause is made. Since this Form seems to require that only the ground of challenge need be set out in accordance with the wording of s.638(l), it can been argued that Parliament did not intend to require counsel to provide particulars of the challenge prior to making it. Had Parliament so intended, Form 41 would have been drafted differently so as to require the inclusion of those particulars.

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[78] S.R. Stackhouse, "Procedure on Challenge for Cause: Regina v. Hubbert" (1978) 16 Alta. L. Rev. 120.

[79] Ibid. One author has suggested that the challenge for cause in England is obsolete: Gold, "The Jury in the Criminal Trial", supra, note 61 at 391.

[80] R. v. Makow, supra, note 74. See also R. v. Pilgar (1912), 20 C.C.C. 507 (Ont. H.C.); R. v. Harri (1922), 36 C.C.C. 305 (Ont. H.C.); R.v. Mah Hung (1912), 20 C.C.C. 40 (B.C.C.A.); R. v. Heddleston (1974), 27 C.R.N.S. 113 (Ont. S.C.).

[81] R. v. MacFarlane (1973), 17 C.C.C. (2d) 389 (Ont. H.C.).

[82] R. v. Elliott (1973), 12 C.C.C. (2d) 482 (Ont. H.C.); His Honour I.A. Vannini, "Challenges to a Jury" (1973), 23 C.R.N.S. 57 at 63.

This question has now been settled to some degree by the leading decision of R. v. Hubbert[83], in which the Ontario Court of Appeal held that the challenge for cause may be in the bald words of Form 41. Thus, it appears that particulars are not required and that extrinsic evidence supporting the challenge need not be lead prior to questioning the prospective juror. The Ontario Court of Appeal did, however, state that counsel must have a reason for making the challenge, and that the trial judge must know that reason so as to be able to properly control and direct the trial of the challenge.

This appears to be a reasonable position which falls between the English and the American positions[84]. It allows counsel greater flexibility in challenging a juror for partiality, since in many cases extrinsic evidence will not be available and the only evidence of partiality will be from the juror's own statements . At the same time, requiring that a reason exist behind the challenge guards against the challenge being used as a "fishing expedition" to determine the type of juror the person called will be, as a means of indoctrinating the jury as to the defence, and as a deliberate aid to decide whether to exercise a peremptory challenge. Canadian courts have stressed that these uses, or misuses, of the challenge for cause will not be tolerated[85].

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[83] Supra, note 25. This has been followed in several cases; see, for instance, R. v. Pere Gregoire de la Trinite (1980), 60 C.C.C. (2d) 542 (Que. C.A.); R. v. Pirozzi (1987), 19 O.A.C. 191 (Ont. C.A.).

[84] Although there has been some criticism of this in that requiring that there be a "reason" behind the challenge and that it be stated to the trial judge is very similar to requiring "particulars" of the challenge. Thus, the practical effect of requiring a reason may be to require particulars prior to allowing the challenge to be made: J.F. Hamilton, "Challenging for Cause" (1977), 39 C.R.N.S. 58.

3. What Questions May Be Asked of a Prospective Juror?

A second contentious issue that has arisen surrounding the challenge for cause is the nature of the questions that may be posed to a prospective juror in order to determine his or her impartiality. In the United States, counsel is allowed to ask a very broad range of questions which goes far beyond those questions strictly needed to determine the juror's impartiality. In the words of one writer, the American

> ...voir dire of a challenge for cause is a mini-trial at which potential jurors are extensively questioned so as to ascertain whether they are favourable and to 'indoctrinate' them with the positions of the respective parties[86].

This type of "fishing expedition" is frowned upon in Canada[87]. However, while Canadian courts generally agreed that the range of questions permitted in the United States is too broad, Canadian judges differ greatly in the latitude of the questions they will allow to be put to a prospective juror on a challenge for cause.

Some judges permit only a very narrow range of questions to be asked. In R. v. McCorkell[88], for instance, the accused was charged with first degree murder. The trial judge allowed the defence to question each prospective juror only as to whether the prospective juror had heard about the case; had discussed it; had formed an opinion about it; and had any doubt about his or her ability to render a verdict free from bias or prejudice. The trial judge did not allow the defence to ask each juror his or her age, marital status, or occupation[89].

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[85] See, for instance, R. v. McAuslane (1973), 23 C.R.N.S. 6 (Ont. Co. Ct.); R. v. Hubbert, supra, note 75. Indeed, the right to challenge is a right to reject, rather than select, jurors: R. v. Lalonde (1898) 2 C.C.C. 188 (Que. Q.B.); A.A. Fradsham,"Challenges for Cause" (1974) 12 Alta. L.Rev. 327 at 336.

[86] Gold, "The Jury in the Criminal Trial", supra, note 61 at 391.

[87] See, for instance, R. v. Elliott, supra, note 82.

[88] (1962), 27 C.R.N.S. 155 (Ont. S.C.).

Other judges permit a very broad range of questions to be asked. This was the situation in R. v. McClure,[90] in which the accused was charged with the murder of a policeman. During the challenge for cause, defence counsel was allowed to ask each prospective juror his or her address and employment; whether the juror had read anything about the case in the papers; whether the juror remembered what he or she had read; whether the juror had discussed the case with anyone; whether either the juror or his or her family had contributed to the fund established for the police officer's family; whether the juror was related to the deceased police officer or to anyone else on the police force; whether the juror had any prejudice or bias against the accused; whether the nature of the charge itself created any prejudice or bias in the juror; and whether the juror had formed an opinion[91] about the accused's innocence or guilt.

Although the questions asked of a prospective juror can thus be very broad, there are limits. In particular, challenges for cause must not furnish the background for racial, national, or religious overtones in the trial, since such overtones obscure the true issues of guilt or innocence and harm the proper administration of justice[92]. Thus, an Italian accused charged with the death of a policeman was not allowed to ask each prospective juror whether the juror is prejudiced against Italians; whether the juror knows or is friends with any Italians; whether the juror is a member of a club that excludes Italians; and whether the juror would evaluate an Italian's testimony in the same way as he would a police officer's testimony[93].

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[89] See also R. v. Wright (1973), 23 C.R.N.S. 75 (Ont. S.C.); R. v. Salvador (1980), 21 C.R. (3d) 1 (N.S.S.C.A.D.).

[90] (1969), 23 C.R.N.S. 19 (Ont S.C.). See also R. v. McAuslane, supra, note 85; R. v. Collins, supra, note 13.

[91] Even where a broad range of questions is allowed, there has been debate over whether it is appropriate to ask not only if the juror has formed an opinion as to the accused's guilt or innocence, but also what that opinion is. While most courts will not allow this latter question to be asked, it was allowed in R. v. Lesso (1952), 23 C.R.N.S. 179 (Ont. S.C.).

Further, while Canadian courts are generally willing to allow questions relating to the juror's impartiality in the light of extensive pre-trial publicity surrounding the trial and the accused, they are not willing to go beyond this and allow a prospective juror's impartiality to be examined in light of the juror's own prejudices concerning the race, nationality, and religion of the accused. Such an examination is seen as being aimed at determining the kind of juror he or she is likely to be in terms of personality, beliefs, and prejudices, rather than at determining whether he or she is impartial.

4. Does an Unsuccessful Challenge for Cause Rule Out a Peremptory Challenge?

The third contentious issue surrounding the challenge for cause is its effect upon the peremptory challenge. In particular, there has been debate over whether an unsuccessful challenge for cause automatically results in the prospective juror being sworn and taking his or her place in the jury, or whether the accused can still exercise the right of peremptory challenge to have the prospective juror excluded from the jury.

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[92] R. v. Racco (No. 2) (1975), 29 C.R.N.S. 307 (Ont. Co. Ct.).

[93] Ibid. See also R. v. Crosby (1979), 49 C.C.C. (2d) 255 (Ont. H.C.), in which the accused was not allowed to question each prospective juror as to his or her prejudices against black people.

This is of direct relevance in cases involving pre-trial publicity. An accused who challenges a juror for lack of impartiality due to prejudicial publicity may still be unsatisfied as to the juror's impartiality even if the triers of the issue determine the juror is impartial. In such a situation, the accused may not wish to be tried by that juror and will want to use the right of peremptory challenge to prevent that person from sitting on the jury.

Canadian courts have taken two different approaches to this issue. One line of authority has held that an unsuccessful challenge for cause precludes an accused from exercising a peremptory challenge and results in the prospective juror being sworn as a juror. This was the position taken in R. v. Rose[94], in which the Quebec Court of Appeal held that these two types of challenges are alternative means by which a juror may be rejected. Thus, if the prospective juror is unsuccessfully challenged for cause, the accused can not then rely upon the peremptory challenge (and the Crown cannot rely upon its stand-aside) to reject the juror.

The second line of Canadian authority has taken the opposite approach. In R. v. Ward[95], the Ontario Court of Appeal held that an accused can peremptorily challenge a prospective juror after he or she has unsuccessfully challenged him for cause. This was followed and affirmed in Cloutier v. R.[96], in which the Supreme Court of Canada stressed that the basis of the peremptory challenge is subjective and that the right to exercise it does not depend on facts that must be established but rather on the party's mere belief that the prospective juror is partial. There is thus no logical connection between the challenge for cause and the peremptory challenge, and the exercise of one is not dependent upon the exercise of the other[97].

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[94] (1973), 12 C.C.C. (2d) 273 (Que. C.A.).

[95] [1972] 3 O.R. 665 (C.A.). See also R. v. Wright, supra, note 89; R. v. Palomba (No. 3) (1975), 24 C.C.C. (2d) 19 (Que. C.A.).

[96] [1979] 2 S.C.R. 709.

5. Other Procedural Issues

It is clear that the challenge for cause must be made before the prospective juror is sworn. Once the juror is sworn, it is too late to challenge him or her either for cause or peremptorily[98]. Once the challenge for cause is begun, the onus of proof is on the party making the challenge to establish its validity on the balance of probability[99]. As well, the challenge cannot be withdrawn once the questioning has begun[100].

There is some debate over the trial judge's role in a challenge for cause. In addition to vetting the questions to be put to the prospective jurors, it appears that the trial judge may also examine the potential jurors after counsel's challenges for cause have been rejected and may, on his or her own initiative, dismiss any of those jurors for lack of indifference[101]. However, the judge may not go further than this by refusing to allow counsel to challenge each juror, questioning each juror, and then making the final decision as to each juror's lack of indifference[102].

In the end, however, the trial judge's conduct of the challenge for cause and the extent and nature of questions he or she allows to be put to prospective jurors are matters within his or her judicially-exercised discretion. The appellate court will not intervene unless this discretion has been wrongfully exercised or has caused the accused to be deprived of a fair trial[103]. The real question, thus, is "...whether the particular publicity and notoriety of the accused could potentially have the effect of destroying the prospective juror's indifference between the Crown and the accused"[104].

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[97] Although the challenge for cause must not be used as a deliberate aid in deciding whether to exercise the peremptory challenge: R. v. Hubbert, supra, note 75.

[98] Vannini, supra, note 82; R. v. Pilgar, supra, note 80; R. v. Mah Hung, supra, note 80.

[99] Vannini, ibid.

[100] R. v. McCorkell, supra, note 88; R. v. Rowbotham (1984), 2 C.C.C. (3d) 189 (Ont. H.C.).

[101] R. v. Pere Jean Gregoire de la Trinite, supra, note 83.

[102] R. v. Guerin (1984), 13 C.C.C. (3d) 231 (Que. C.A.).

Although the trial judge has discretion over the conduct of the challenge, the actual merits of the challenge are decided by two jurors in accordance with s.640(2) of the Criminal Code. It appears that their finding as to the merits of the challenge is conclusive and is not appealable[105].

6. Defects

While the challenge for cause is thus an important means by which the accused's fair trial before an independent and impartial trial can be protected, it is not perfect. For instance, reliance on the challenge for cause is based on the assumption that jurors will be consciously aware of and will openly admit their biases and prejudices. However, this assumption does not take into account the fact that jurors may lie about their biases and beliefs or may have unconscious biases and prejudices of which they are not aware. Thus, the challenge for cause will not identify jurors who either consciously or unconsciously do not reveal their true beliefs and biases.

Further, the trial judge's wide discretion in the conduct of the challenge significantly limits the right to challenge for cause and results in misinterpretations of this right[106]. For instance, the leading case of Hubbert established that while counsel need not lead extrinsic evidence prior to making the challenge, the trial judge must know counsel's "reason" for making the challenge before he allows it to proceed. However, neither the case law nor the Criminal Code sets out the test to be used by the trial judge when determining whether counsel has sufficient reason to make the challenge. A trial judge could require a reason so strong and compelling that it could only be established by extrinsic evidence.

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[103] R. v. Pirozzi, supra, note 83.

[104] R. v. Zundel (1986), 56 C.R. (3d) 1 at 37 (Ont. C.A.).

[105] R. v. Carlin (No. 1) (1903), 6 C.C.C. 365 (Que. K.B.).

[106] J. Rosen, "The Zundel Appeal: Challenging Zundel's Jury" (1987), 56 C.R. (3d) 88 at 89.

Likewise, the trial judge's power to select the questions to be asked of the prospective jurors can significantly restrict counsel's ability to challenge for cause. As Rosen puts it,

> The editing procedure devised by trial judges has caused the examination of prospective jurors on the trial of the issue to become stilted, repetitive and generally unproductive in terms of producing meaningful evidence upon which the triers must ultimately resolve the fundamental question: whether the prospective juror is in fact impartial[107].

The potentially negative effect of the trial judge's broad discretion is further compounded by the fact that the exercise of his or her discretion is rarely appealable. Thus, due to the lack of guidance in the Code and in the case law as to how the trial judge's discretion should be exercised, the conduct of the challenge for cause depends largely upon how each individual judge views the challenge for cause in general, and how he or she views his or her own role in the challenge in particular.

Although the difficulties created by this lack of guidance appear obvious, little attention has been paid to this problem. Indeed, there appears to be a widespread assumption among both judges and commentators that the challenge for cause as it presently exists is an effective means of dealing with the impact of pre-trial publicity upon prospective jurors. For instance, while the Law Reform Commission of Canada has considered the jury's role in general and has proposed the codification of the law and practice relating to the jury[108], its draft legislation sets out no guidelines and makes no significant change to the law relating to challenges for cause other than to provide that the merits of the challenge be decided by the judge and not by the two jurors. This lack of suggested reforms to this area of law seems to indicate that the Commission feels that the current law is satisfactory.

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[107] Ibid. at 91.

Given this reliance upon the perceived effectiveness of the challenge for cause, the lack of a serious examination of its actual efficacy and the lack of guidelines governing the conduct of the challenge are unacceptable. This is particularly so in light of the challenge's importance as a means of dealing with pre-trial publicity. As Macdougall tersely states,

> The issues of jury selection are not frivolous; they affect the fundamental rights of an accused person to be tried by a properly constituted tribunal and the rights of members of the community to participate in the administration of justice[109].

C. OATH

A second means of ensuring that the triers of fact are impartial is through the oath that each prospective juror swears upon becoming a juror to impartially and conscientiously try the matter before the court and to give a true verdict according to the evidence[110]. In effect, each juror swears to impartially try the case only upon the evidence presented to the court and not upon information heard outside the courtroom.

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[108] Law Reform Commission of Canada, Report 16: The Jury (Ottawa: Minister of Supply and Services Canada, 1982).

[109] "Jury-Vetting by the Prosecution" (1981-82) 24 Crim. L.Q. 98 at 115.

[110] Law Reform Commission of Canada, Report 16, supra, note 108.

The courts rely greatly upon the oath as being an effective means of ensuring a juror's impartiality. This reliance is based upon a very strong judicial presumption that each juror will obey his oath[111]. As Rosen states when discussing the Hubbert and the Zundel decisions, both cases

> ...commence with the presumption that a juror will abide by his oath regardless of any preconceived ideas or personal prejudices, and that it is somehow unfair to the juror and costly to the system to ask whether the presumption is in fact true...[112]

His observations can be applied with equal vigor to the great majority of decisions dealing with jurors and their impartiality.

There has been very little analysis of the use and effectiveness of the oath. Both the judiciary and the commentators unquestioningly accept the oath as being an effective and valuable way of guaranteeing that a juror is impartial and that he has not been influenced by pre-trial publicity. As with many of the other procedural safeguards already discussed, this unquestioning reliance upon the oath as being a satisfactory means of dealing with pre-trial publicity is, without a closer examination of its efficacy, unacceptable.

D. SEQUESTRATION OF THE JURY

The sequestration of the jury during the hearing of a trial is a third means by which the jury's impartiality is sought to be ensured. "Sequestration" refers to the isolation of the jury from contact with the public during the course of a trial. In practice, this is accomplished by confining the jury to a hotel when the trial is not in session and by ensuring that the jurors do not speak to anyone other than each other and are not exposed to publicity about the trial until it is over and they have rendered a verdict. Thus, pursuant to s.647(2) of the Criminal Code, the sequestered jury will be kept under the charge of an officer of the court and will be prevented from communicating with outside persons.

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[111] See, for instance, R. v. Wilson, supra, note 9; R. v. Trotchie (1984), 31 Sask. R. 250 (Q.B.); R. v. Mah Hung, supra, note 80; R. v. Tremblay (1978), 45 C.C.C. (2d) 238 (Que. S.C.).

[112] Supra, note 106 at 88.

In most cases, however, the jurors are allowed to separate[113] pursuant to s.647(1) of the Code and return to their own homes at the end of each day[114] with a warning from the judge not to discuss the case with anyone and not to read or listen to media reports about the case. Their exposure to publicity is also limited by s.648 of the Code, which restricts the publication of information regarding any portion of the trial at which the jury is not present and which makes such publication a summary conviction offence. Publication in breach of this section may result in the appeal court setting aside the verdict if the publication is so inherently prejudicial to the accused and so widespread that it might have affected the jury's verdict and resulted in a miscarriage of justice[115].

In cases involving sensational publicity, it may be possible to have the jury sequestered so that it is isolated from the publicity. This is, of course, within the trial judge's discretion[116]. If the jury is sequestered and the sequestration is breached, the trial judge has the further discretion to declare a mistrial if he or she feels that a "miscarriage of justice" might result. In such a case, the jury will be discharged and a new trial will be held[117]. If the trial judge does not declare a mistrial, the breach of the sequestration will not affect the proceedings' validity[118], and the appeal court will not set aside the verdict unless it amounts to a miscarriage of justice in the circumstances[119].

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[113] Since "...generally the juror's sense of duty makes sequestration unnecessary": Robertson, supra, note 7 at 206.

[114] Once the jury has retired to reach a verdict, however, it will be sequestered until it has done so: Gold, "The Jury in the Criminal Trial", supra, note 61 at 407.

[115] As was enunciated in R. v. Demeter, supra, note 69.

[116] Gold, "The Jury in the Criminal Trial", supra, note 61 at 407.

It should be noted that sequestration operates primarily in respect of publicity occurring during the trial rather than before the trial, although presumably pre-trial publicity can be significant when its presence, together with the presence of publicity during trial, has such a potentially prejudicial impact upon the jurors that they must be sequestered. The effectiveness of this safeguard is further limited by the fact that in many cases, pre-trial publicity may have already harmed the jury's impartiality to such an extent that the damage cannot be repaired by sequestering the jury[120].

E. THE JUDGE'S INSTRUCTIONS AND CHARGE TO THE JURY

Finally, the instructions and the charge given by the judge to the jury are considered an effective means of ensuring that the jurors are not influenced by pre-trial and by trial publicity. The trial judge will often give preliminary instructions to the jury after the jurors have been sworn and before the Crown opens its case. While the Code does not prescribe the content of these instructions, in practice they usually include instructions to the jurors not to discuss the case with anyone; to calmly and dispassionately consider the evidence without sympathy or prejudice for or against any party to the trial; to determine the accused's guilt or innocence solely from the evidence heard in the courtroom during the trial; and to put any other information about the case from their minds[121].

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[117] Criminal Code, s.647(4)

[118] Ibid., s.647(3).

[119] Cases where breach of the sequestration resulted in a mistrial or in the setting aside of the verdict include R. v. Dorion (1953), 17 C.R. 352 (Man. Q.B.); R. v. Masuda (1953), 17 C.R. 44 (B.C.C.A.); R. v. Ryan (1951), 13 C.R. 363 (B.C.C.A.); R. v. Nash (No. 1) (1949), 8 C.R. 378 (N.B.S.C.A.D.); R. v. Mercier (1973), 12 C.C.C. (2d) 377 (Que. C.A.). But see Bertrand v. R. (No. 2) (1953), 17 C.R. 189 (Que. Q.B.), aff'd (1953), 17 C.R. 208 (S.C.C.): breach of the sequestration did not amount to a miscarriage of justice.

[120] Kesterton, supra, note 39 at 25.

After the Crown and the defence have closed their cases, the trial judge will give a charge to the jury, wherein the judge explains the legal concepts involved, tells the jury of its supremacy in matters of fact, puts the respective positions of both parties before the jury, and charges the jury on every defence available to the accused. As well, although the Code is silent as to the charge's contents, the trial judge will often reiterate that the jury must decide the accused's guilt or innocence without prejudice and without any preconceived notions, that it must make this decision solely on the evidence heard in the courtroom, and that it must ignore any other information about the case[122].

It is clear from the case law that the courts attach great weight and importance to the instructions and charge as a means of ensuring the jurors' impartiality[123]. Indeed, in many cases the accused's use of other procedural safeguards, such as the change of venue, is curtailed by judicial reliance upon the instructions and charge as an effective way of protecting the accused's right to a fair trial[124]. This reliance, however, is based upon a broad, unquestioned assumption that the jurors will seriously heed the trial judge's instructions and charge. As the Court stated in R. v. Hubbert,

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[121] E.L. Haines, "Criminal and Civil Jury Charges" (1968) 46 Can. Bar Rev. 48 at 61; Law Reform Commission of Canada, Working Paper 27, supra, note 71 at 71. Sample jury instructions are set out in J. de N. Kennedy, Aids to Jury Charges (Criminal), 2nd ed. (Agincourt, Ontario: Canada Law Book Limited, 1975) at 25-27.

[122] Haines, supra, note 121 at 70. A sample jury charge is found in Kennedy, ibid. at 31-32.

[123] See, for instance, R. v. Dubois, supra, note 65; R. v. Bell, (1973), 14 C.C.C. (2d) 225 (N.S.S.C.A.D.).

[124] See, for instance, R. v. Jansen, supra, note 18; R. v. Wilson, supra, note 9.

> The jury system in this country functions on the fundamental assumption that a juror who is properly sworn is able to, and will, follow the direction of the judge that he is to determine the guilt or innocence of the accused solely on the evidence which he has heard in Court free from extraneous considerations, and free from either prejudice against, or favour for the accused[125].

Clearly, reliance upon this unquestioned assumption without further examination of its truth is unacceptable. Indeed, in light of the empirical evidence that has been gathered from several social science studies[126], this assumption may be unwarranted.

IV. THE USE OF SOCIAL SCIENCE DATA

A. ITS USE IN DETERMINING THE EFFICACY OF THE SAFEGUARDS

Throughout this discussion of the procedural safeguards available to ensure the accused's fair trial before an impartial jury, two basic themes have emerged. First, it is clear that the courts rely heavily upon these safeguards as being satisfactory ways of ensuring the accused's fair trial. Second, it is equally clear that this judicial reliance upon the safeguards is founded upon unquestioned assumptions as to their efficacy. These assumptions have only recently begun to be objectively tested in Canada in non-judicial settings.

Such objective testing is necessary. For instance, it is not enough to blindly rely on the juror's oath as a way of ensuring each juror's impartiality without having some idea as to what the oath really means to a juror and as to how seriously it is taken by a juror. Likewise, it is not enough to rely upon the trial judge's instructions as a means of guaranteeing impartiality without some further indication that jurors will indeed obey those instructions. Social science data may thus be valuable in assessing each procedural safeguard and its actual efficacy in practice.

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[125] Supra, note 75 at 44.

[126] As is discussed below.

Several social science studies have raised questions as to the efficacy of the trial judge's instructions. For instance, studies have shown that simulated juries which are made aware of an accused's criminal record and which are instructed that the record goes only to the accused's credibility will nonetheless be influenced by the record when determining guilt. Indeed, knowledge of the record tends to permeate the jury's entire discussion of the case and affects the jury's perception and interpretation of the evidence, despite their instructions to consider it only in relation to credibility[127].

Likewise, a simulated jury which knows that the accused's bail has been revoked and that the accused is now in custody is much more likely to consider this information and find the accused guilty, even where it has been instructed to ignore such information[128]. Clearly, this raises serious questions as to whether the jury will obey instructions from the judge in general, and whether it will obey instructions from the judge to ignore pre-trial publicity in particular.

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[127] See, for instance, A.N. Doob & H.M. Kirshenbaum, "Some Empirical Evidence on the Effect of s. 12 of the Canada Evidence Act upon an Accused" (1972-73) 15 Crim. L.Q. 88; V.P. Hans & A.N. Doob,"Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries" (1975-76) 18 Crim. L. Q. 235.

[128] See, for instance, A.N. Doob & A. Cavoukian, "The Effect of the Revoking of Bail: R. v. Demeter" (1976-77) 19 Crim. L. Q. 196; P. Koza & A.N. Doob, "The Relationship of Pre-Trial Custody to the Outcome of a Trial" (1974-75) 17 Crim. L.Q. 391.

B. ITS USE IN DETERMINING WHEN AND HOW SAFEGUARDS SHOULD BE INVOKED.

While social science data is thus relevant in determining the efficacy of the procedural safeguards, it is also relevant in determining when and how the safeguards should be invoked. In particular, it has been argued that social science data should be used to establish the grounds for a challenge for cause; to give insight into the types of questions that should be put to the potential jurors on a challenge; and to determine when a change of venue should be ordered[129].

In relation to challenges for cause, social scientists argue that because they are trained to draw data from representative samples of human subjects, because they are experienced in posing questions in non-obvious ways, and because they devote all their time to studying and predicting human behaviour, they are better able than are lawyers and judges to identify biased prospective jurors[130]. Thus, allowing social scientists to use their expertise by compiling the questions to be asked of prospective jurors may allow covert as well as overt bias to be identified in the jurors, thus ensuring that the jurors are truly impartial[131].

In relation to change of venue applications, social scientists argue that their expertise is needed to accurately determine the level of prejudice existing in the community where the trial is to be held in order to determine if the trial should be moved to another community[132]. This can be accomplished by having social scientists design and conduct public opinion surveys which are aimed at determining the degree of public knowledge of the case and the degree of bias present in the community[133]. It is argued that this evidence would be a great improvement over the evidence presently presented in support of change of venue applications, which often amounts to "...tenuous documentation of pre-trial publicity and perhaps some unsubstantiated 'opinion' testimony by persons purportedly in touch with the pulse of the community..."[134].

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[129] N. Vidmar & J.W.T. Judson, "The Use of Social Science Data in a Change of Venue Application: A Case Study" (1981) 59 Can. Bar Rev. 76.

[130] See, for instance, N. Vidmar, "Social Science and Jury Selection", in The Law Society of Upper Canada, Psychology and the Litigation Process (Toronto: 1976) 100 at 102-103.

[131] Ibid. For a general discussion of the uses of social science data in jury selection procedures and in relation to a wide variety of other issues concerning the jury, see V.P. Hans & N. Vidmar, Judging the Jury (New York: Plenum Press, 1986).

While social science data is presently used in the United States in sensational cases, Canadian courts have been very reluctant to use such data in relation to both the change of venue application[135] and to the jury selection process[136]. Indeed, Canadian social scientists themselves stress that while their work can be as useful in Canada as in the United States to eliminate biased jurors, their work should not erode the trial judge's control over the process by putting psychologists and social scientists in charge of the jury selection process[137].

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[132] Vidmar & Judson, supra, note 129.

[133] As was the case in S.J. Arnold & A.D. Gold, "The Use of a Public Opinion Poll on a Change of Venue Application" (1978-79) 21 Crim. L.Q. 445.

[134] Vidmar & Judson, supra, note 129 at 76.

[135] Indeed, it appears that the first time that survey evidence was allowed in a Canadian change of venue application was in 1981: ibid. at 98.

[136] See R. v. Caldough (1961), 36 C.R. 248 (B.C.S.C.), for instance, in which defence counsel had someone phone the members of the jury panel and ask them questions intended to determine whether any potential juror was biased or prejudiced. The jury panel was discharged and a new panel was summoned, the court finding that this informal survey was an interference with the course of justice.

[137] Vidmar, supra, note 130 at 127.

V. CONCLUSION

It is clear that the procedural safeguards established by Canadian criminal law are an important means by which the integrity of the trial process is protected. Indeed, these safeguards are of critical importance in situations where pre-trial publicity has tainted the impartiality of the public and of the jurors. However, it is also clear that these safeguards are not in themselves a panacea for the problems created by the conflict between freedom of expression and the right of an accused to a fair trial.

This is well-illustrated by the American situation[138]. In the United States, the courts rarely, if ever, use their contempt powers and instead rely almost exclusively upon these safeguards to protect an accused's right to a fair trial when it has been threatened by pre-trial publicity. As a result, the media is allowed to print what it wishes, regardless of the harm this may do to the accused's fair trial. Only after the prejudicial information has been published and the fairness of the trial has been threatened will the courts step in and use these safeguards in an attempt to ensure that the accused's trial is fair[139].

At its most extreme, this heavy reliance upon the use of the safeguards leads to situations in the United States where an accused is convicted and spends several years in prison before a mistrial is declared, his or her conviction is overturned, and a new trial is ordered on the basis that pre-trial publicity resulted in a miscarriage of justice[140]. Clearly, such ex post facto justice poses serious problems. For instance, an accused's eventual acquittal on the charges may only come after he or she has spent years in prison and after his or her life has been irrevocably altered. Likewise, this ex post facto justice thwarts society's interest in ensuring that individuals are fairly tried within a reasonable time. The only real winner in this situation is the media, for it is never held accountable for what it publishes or broadcasts.

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[138] As is discussed in Chapter 6, "The American Experience".

[139] Beckton, supra, note 41 at 71.

[140] As is discussed more fully in Chapter 6, "The American Experience".

On the other hand, however, the conflict between freedom of expression the right of an accused to a fair trial cannot be adequately solved by an almost-exclusive reliance upon the contempt power at the expense of these procedural safeguards, as is the situation in England. There, the courts rarely use these procedural safeguards, relying instead upon their sub judice contempt powers to prevent the publication of prejudicial information about an accused and his trial[141]. In essence, pre-trial publicity is dealt with at its source, the media. This ignores the very prejudicial, ongoing effects of the publicity once it has, in fact, reached the public.

Perhaps the best way of dealing with the conflict between these two competing rights of freedom of the press and the accused's right to a fair trial is to steer a middle course between exclusive reliance upon the procedural safeguards and exclusive reliance upon contempt of court. This is the course that has been followed in Canada.

Thus, while Canadian courts rely both on prior restraints to prevent the pre-trial publication of certain types of prejudicial information and on contempt of court proceedings to deter such prejudicial publication by punishing those responsible for it, the media is still able to publish information relating to pending court cases. If it abuses this freedom, the courts can then use the procedural safeguards to deal with the resulting damage to an accused's fair trial. In other words, using prior restraints, contempt of court proceedings, and the procedural safeguards ensures that some restraint is placed upon the source of the pre-trial publicity while at the same time minimizing the damage that is done by the publicity.

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[141] Beckton, supra, note 41 at 70.

These safeguards, however, are not perfect, and problems exist with each of them. The broad, unfettered discretion given to the trial judge in regard to many of these safeguards creates problems, and guidelines concerning the exercise of this judicial discretion should be established. Likewise, the unquestioning assumption that these safeguards are effective means of dealing with prejudicial pre-trial publicity should be examined more critically in the light of social science data to determine whether this assumption is warranted. Such a critical analysis would also show how these procedural safeguards could be modified to increase their effectiveness. As well, the use of social science data to determine when the safeguards are invoked, as in, for instance, determining when the level of prejudice in a community is such as to require a change of venue, should be encouraged.

These changes to these procedural safeguards would make the safeguards a more valuable means of dealing with prejudicial pre-trial publicity and its impact upon an accused's fair trial. These changes would also strengthen the position of the procedural safeguards as one of the four main bulwarks, along with prior restraints, contempt of court proceedings, and defamation proceedings, which protect the accused's rights in the face of encroaching pre-trial publicity.

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CHAPTER 5

DEFAMATION

I. INTRODUCTION

A fourth means by which an accused can deal with the effects of pre-trial publicity is through the law of defamation. As with prior restraints, contempt proceedings, and the procedural safeguards, defamation proceedings can be used to protect an accused whose rights are threatened by prejudicial pre-trial publicity. Unlike prior restraints, contempt proceedings, and the procedural safeguards, however, the law of defamation is intended not so much to ensure the trial process's integrity and the accused's right to a fair trial, but rather to protect an individual's interest in his or her reputation. Defamation also differs from these other means of dealing with pre-trial publicity in that it takes place primarily in the civil law arena in the form of lawsuits against those responsible for the defamation[1], rather than in the criminal law arena.

The law of defamation exists to protect and vindicate an individual's interest in his or her reputation; to secure monetary compensation for damage done to that reputation; and to deter the public generally, and the defendant specifically, from other acts of defamation[2]. In relation to pre-trial publicity in particular, the law of defamation is relevant in several ways. For instance, comments and editorials published by the media concerning an accused's character or guilt may be defamatory[3]. The media's publication of comments made by others concerning an accused's character or guilt, as in, for instance, the publication of interviews with an accused's neighbors or co-workers, may also be defamatory. Further, the media's publication of statements made during court proceedings involving the accused may, in some circumstances, be defamatory. An accused whose reputation has been damaged by such defamatory pre-trial publicity may be able to use the law of defamation to recover monetary compensation for that damage.

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[1] Defamatory libel can also be the subject of criminal proceedings: s.264 of the Criminal Code makes it an indictable offence to publish a defamatory libel. However, this offence is rarely used today in Canada.

[2] A.M. Linden, Canadian Tort Law, 4th ed. (Toronto: Butterworths, 1988) at 627.

[3] Clearly, the law of defamation overlaps to some extent with prior restraints, contempt of court and procedural safeguards. For instance, publicity about an accused may be so

However, while defamation is thus a fourth means of dealing with pre-trial publicity, it is far less used by accused than are prior restraints, contempt proceedings, and the procedural safeguards. This is due to a number of difficulties that exist with the law of defamation and which significantly reduce its effectiveness as a remedy for an accused whose reputation has been damaged by pre-trial publicity. It should also be noted that a number of difficulties exist with the law of defamation which adversely affect the rights and defences available to media defendants. Some commentators have also suggested that the law of defamation may violate freedom of expression under s. 2(b) of the Canadian Charter of Rights and Freedoms.

In order to understand the importance of defamation proceedings in relation to pre-trial publicity, six topics will be addressed[4]. First, the elements

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prejudicial that its publication is sought to be restrained; that it interferes with the court's handling of the matter and thus amounts to contempt of court; that it requires the use of procedural safeguards to counter its prejudicial effects; and that it results in the accused bringing defamation proceedings against those responsible for the publicity.

[4] It must be emphasized that this discussion of defamation is intended to serve as an overview of this area of law specifically in relation to pre-trial publicity, and is not intended to be a treatise on the law of defamation in general. For detailed discussion of the law of defamation, see the following authorities: R.E. Brown, The Law of Defamation in Canada (Toronto: The Carswell Company Limited, 1987); J.S. Williams, The Law of Libel and Slander in Canada (Toronto: Butterworths, 1988); P.F. Carter-Ruck & R. Walker, Carter-Ruck on Libel and Slander, 3rd ed. (London: Butterworth & Co. (Publishers) Ltd., 1985) (hereafter referred to as Carter-Ruck); Duncan and Neill on Defamation, 2nd ed. (London: Butterworth & Co. (Publishers) Ltd., 1983) (hereafter

of a defamation action will be discussed. Second, the defences available to media defendants will be considered. Third, the remedies available to a successful plaintiff will be addressed. Fourth, criticisms of and proposals for reform of this area of law will be considered. Fifth, the Charter's impact on defamation will be examined. Finally, the crime of defamatory libel as it exists under the Criminal Code will be briefly discussed.

II. ELEMENTS OF A DEFAMATION ACTION

A. INTRODUCTION

The law of defamation has existed for centuries, in one form or another, as a means of protecting individual reputation[5]. Canadian defamation law derives largely from English common law, with some statutory modifications. As Brown puts it, "other than in Quebec, the law of defamation in Canada combines the wisdom and folly of the common law with some relatively modest changes by way of legislation"[6].

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referred to as Duncan and Neill); J. Porter & D.A. Potts, Canadian Libel Practice (Toronto: Butterworths, 1986); Gatley on Libel and Slander, 8th ed. (London: Sweet & Maxwell Limited, 1981) (hereafter referred to as Gatley).

[5] C. Beckton, "Freedom of the Press in Canada: Prior Restraints", in P. Anisman & A.M. Linden, eds., The Media, the Courts and the Charter (Toronto: Carswell, 1986) 119 at 128. For a detailed history of the law of defamation, see Carter-Ruck, supra, note 4 at 16-29; Brown, supra, note 4 at 15-21.

[6] Brown, supra, note 4 at 6. In Alberta, the law of defamation has been modified by the Defamation Act, R.S.A. 1980, c. D-6. Legislation modifying the common law in the other provinces is as follows:

British Columbia: Libel and Slander Act, R.S.B.C. 1979, c. 234.
Saskatchewan: The Libel and Slander Act, R.S.S. 1978, c. L-14.
Manitoba: Defamation Act, R.S.M. 1987, C. D20.
Ontario: Libel and Slander Act, R.S.O. 1980, c. 237.
Quebec, Press Act, R.S.Q. 1977, c. P-19.
New Brunswick: Defamation Act, R.S.N.B. 1973, c. D-5.
Nova Scotia: Defamation Act, R.S.N.S. 1967, c. 72.
Prince Edward Island: Defamation Act, R.S.P.E.I. 1974, c. D-3.
Newfoundland: The Defamation Act, S.N., 1983, c. 63.
Yukon: Defamation Act, R.S.Y.T. 1986, c. 41.

In order for an accused whose reputation has been damaged by pre-trial publicity to succeed in a defamation action against the media organization responsible for the publicity, the accused, as the plaintiff, must first establish a *prima facie* case by showing that (1) a defamatory statement (2) about or concerning the accused (3) was published by the media defendant to a third person. The accused need not, however, prove the statement was malicious, false, or caused damage: these are presumed in a plaintiff's favour.

B. "...A DEFAMATORY STATEMENT..."

First, the accused must establish that the statement made by the media defendant about the accused was defamatory. While there is no universally-accepted definition of "defamation", one often-used definition states that[7]

> A defamatory imputation is one to a man's discredit, or which tends to lower him in the estimation of others, or to expose him to hatred, contempt or ridicule, or to injure his reputation in his office, trade or profession, or to injure his financial credit[8].

The lack of a single definition of defamation may be a reflection of the very wide range of statements found to be defamatory[9]. For instance, it has been considered defamatory to call an alderman racist[10]; to call a rival union's organizer a Communist[11]; to state that the Minister of Justice stopped a police

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Northwest Territories: *Defamation Ordinance*, R.O.N.W.T. 1974, c. D-1.

[7] *Gatley*, *supra*, note 4 at para. 31

[8] This has been cited in many cases: see, for instance, *Porisky* v. *Scott* (1982), 20 Alta. L.R. (2d) 359 (Q.B.).

[9] As is stated in *Duncan and Neill*, *supra*, note 4 at para. 7.07, "...it is doubtful whether a single definition is adequate to cover every kind of case which may be encountered in practice, and it is therefore submitted that the most satisfactory solution would be to leave it to the judge to select from the existing judicial definitions the form of words which seems most appropriate to the particular case".

[10] *Cherneskey* v. *Armadale Publishers Ltd*. (1978), 90 D.L.R. (3d) 321 (S.C.C.).

[11] *Brannigan* v. *Seafarers' International Union of Canada* (1963), 42 D.L.R. (2d) 249 (B.C.S.C.).

investigation into kickbacks to a Conservative Party fund[12]; to accuse a planned parenthood group of offering pornographic sex education programs[13]; to accuse a professional gambler of cheating[14]; to call members of a political party throwbacks, losers, and slugs[15]; to state that parents had permanently injured their child by feeding him alcohol[16]; and to accuse an employee of harassing female employees and of having an affair with a customer's wife[17].

In relation to pre-trial publicity and the criminal justice system in particular, pre-trial statements which impute to an individual the commission of a crime, suggest an accused's guilt, or negatively comment on an accused's character are defamatory, since they tend to lower the accused in the estimation of others and expose him or her to hatred, contempt or ridicule. Thus, it is defamatory for the media to state that an accused is charged with a more serious offence than that with which he is actually charged[18]; to identify an individual as an accused when another individual with the same name is the accused[19]; to publish police reports and editorials stating that an individual had committed arson when he is later discharged at a preliminary inquiry[20]; to erroneously state that a lawyer had plead guilty to a fraud charge concerning the mishandling of trust funds[21]; to suggest that a police officer had unjustifiably assaulted an individual when in fact he had been acquitted of assault[22]; and to publish an article giving the impression that the plaintiff was involved in a crime under police investigation[23].

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[12] Baxter v. Canadian Broadcasting Corp. (1979), 63 A.P.R. 114 (N.B.Q.B. T.D.), var'd (1980) 30 N.B.R. (2d) 102 (N.B.C.A.).

[13] Planned Parenthood Newfoundland/Labrador v. Fedorik (1982), 135 D.L.R. (3d) 714 (Nfld. S.C.T.D.).

[14] Caldwell v. McBride (1988), 45 C.C.L.R. 150 (B.C.S.C.).

[15] Christie v. Geiger (1984), 58 A.R. 168 (Q.B.), aff'd (1986) 38 C.C.L.T. 280 (Alta. C.A), leave to app. dis. at 280*n*.

[16] Atkinson v. Canadian Broadcasting Corp. (1981), 49 N.S.R. (2d) 380 (S.C.T.D.).

[17] Spong v. Westpres Publications Ltd. (1982), 2 C.C.E.L. 229 (B.C.S.C.). For a detailed catalogue of defamatory imputations, see Brown, supra, note 4 at 47-121.

[18] Allan v. Bushnell T.V. Co. (1969), 4 D.L.R. (3d) 212 (Ont. C.A.).

[19] Harvey v. Horizon Publications Ltd. (1975), 61 D.L.R. (3d) 570 (B.C.S.C.).

[20] Farrell v. St. John's Publishing Co. (1986), 174 A.P.R. 66 (Nfld S.C.C.A.), var'g (1982), 99 A.P.R. 181 (Nfld. S.C.T.D.).

Of course, the law of defamation is not applicable solely to the media. It is equally defamatory for a private individual to impute to another individual the commission of a crime or to adversely comment on an accused's character or background[24].

The defamatory nature of a statement is determined by the words' natural and ordinary meaning and by the words' innuendo meaning[25]. The natural meaning is the meaning in which the words are reasonably understood by ordinary people using common sense and general knowledge[26]. The innuendo meaning arises where the words are not defamatory in this ordinary meaning, but can be understood in a defamatory sense by persons with knowledge of certain extrinsic facts or circumstances outside of the words themselves[27]. The existence of those extrinsic facts or circumstances must be established by the plaintiff[28].

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[21] Tait v. New Westminster Radio Ltd., [1985] 1 W.W.R. 451 (B.C.C.A.).

[22] Drost v. Sunday Herald Ltd. . (1976), 11 Nfld. & P.E.I.R. 342 (Nfld. S.C.T.D.).

[23] Wells v. Daily News Ltd. (1976), 13 Nfld. & P.E.I.R. 80 (Nfld. S.C.T.D.). For other cases involving the media, pre-trial publicity, and defamation, see: Platt v. Time International of Canada Ltd. (1964), 44 D.L.R. (2d) 17 (Ont. H.C.), aff'd (1964) 48 D.L.R. (2d) 508*n* (Ont. C.A.); Mack v North Hill News Ltd. (1964), 44 D.L.R. (2d) 147 (Alta. S.C.); Mitchell v. Victoria Daily Times, [1944] 2 D.L.R. 239 (B.C.S.C.); LeBlanc v. L'Imprimerie Acadienne Ltee., [1955] 5 D.L.R. 91 (N.B.S.C.Q.B.D.). Also see Brown, supra, note 4 at 73-81.

[24] See, for instance, Todosichuk v. MacLenahan, [1946] 1 D.L.R. 557 (Alta. S.C.), where the defendant said the plaintiff had been a pimp in Saskatchewan; Canada v. Lukasik (1985), 58 A.R. 313 (Q.B.), where the defendant accused the plaintiff of rape; Risk v. Zeller's Ltd. (1977), 27 N.S.R. (2d) 532 (S.C.T.D), where the store manager accused the plaintiff of theft; Misiner v. L.I. Trabert Ltd. (1982), 102 A.P.R. 633 (N.S.S.C.T.D.) and Siepierski v. F.W. Woolworth Co. (1979), 34 N.S.R. (2d) 551 (S.C.T.D.), where security guards accused the plaintiffs of theft.

[25] Planned Parenthood Newfoundland/Labrador v. Fedorik, supra, note 13; Williams, supra, note 4 at 15; Brown, supra, note 4 at 10.

[26] Baxter v. Canadian Broadcasting Corp., supra, note 12; England v. Canadian Broadcasting Corp., [1979] 3 W.W.R. 193 (N.W.T.S.C.). This natural and ordinary meaning includes any inferences or implications which the words might reasonably bear: Linden, supra, note 2 at 632.

As well, the defamatory meaning of a statement is not determined solely from the words themselves, but rather from the entire context and background surrounding the words. For instance, in determining whether a television program is defamatory, the spoken words, the inferences from those words, the actors' gestures and expressions, and the emotional effect of the music and the sound are all factors considered in this determination[29].

C. "...ABOUT OR CONCERNING THE PLAINTIFF..."

Second, an accused who seeks compensation for injury to his or her reputation must establish that the defamatory statement refers to him or her[30]. In many cases, a defamatory statement will specifically refer to the plaintiff by name. In some cases, however, the plaintiff may not be specifically named, or may be one of a group or class of persons referred to in the defamatory statement.

In such a case, the accused must establish that the words are capable of referring to him or her and that the words would lead reasonable people who know the accused to conclude that the words refer to the him or her[31]. In Booth v. British Columbia Television Broadcasting System[32], for instance, a television broadcast included a prostitute's statements that two unnamed narcotics squad members were taking pay-offs. An action was brought by all the members of the narcotics squad, but at trial only two particular officers could show the broadcast was capable of referring to them and that reasonable people who knew them would conclude the broadcast referred to them[33].

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[27] Mark v. Deutsch (1973), 39 D.L.R. (3d) 568 (Alta. S.C.T.D.).

[28] Bonham v. Pure Water Association (1970), 14 D.L.R. (3d) 749 (B.C.S.C.); Thomas v. Canadian Broadcasting Corp., [1981] 4 W.W.R. 289 (N.W.T.S.C.). Some authorities distinguish between "false" or "popular" innuendos, where the meaning is not confined to the words' literal meaning but includes the reasonable imputations of the words, and "true" or "legal" innuendos, where the words are not defamatory on their face but have a defamatory meaning based on certain extrinsic facts or a technical or slang meaning: Porter & Potts, supra, note 4 at paras. 167-168; Linden, supra, note 2 at 634; Brown, supra, note 4 at 155-161.

[29] As was the case in Lougheed v. Canadian Broadcasting Corp. (1979), 8 C.C.L.T.120 (Alta. S.C.A.D.), var'g (1978), 86 D.L.R. (3d) 229 (Alta. S.C.T.D.).

[30] This is stated in many cases; see, for instance, Church of Scientology of Toronto v. International News Distributing Co. (1974), 48 D.L.R. (3d) 176 (Ont. H.C.).

D. "...WAS PUBLISHED BY THE DEFENDANT TO A THIRD PERSON..."

Third, an accused whose reputation has been damaged by pre-trial publicity must establish that the statement was published to a third person. "Publication" includes any deliberate communication of the defamatory statement in a comprehensible manner[34]. Thus, the media defendant must intend that the statement be published to those who receive it[35].

There has been some debate as to whether a media defendant will be responsible for the republication of a defamatory statement by other media organizations. This will be of significance to an accused who has been the subject of pre-trial publicity which originated from one media organization but which has been picked up and published by other media organizations, and who wishes to sue the original media defendant.

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[31] Sykes v. Fraser (1973), 39 D.L.R. (3d) 321 (S.C.C.); Dale's Trad'n Post Ltd. v. Rhodes (1987), 43 C.C.L.T. 37 (B.C.S.C.); Halluk v. Brown (1982), 41 A.R. 350 (Q.B.); A. Skarsgard, "Freedom of the Press: Availability of Defences to a Defamation Action" (1980-81) 45 Sask. L. Rev. 287 at 299; Gatley, supra, note 4 at para. 281.

[32] (1982), 139 D.L.R. (3d) 88 (B.C.C.A.), aff'g [1976] W.W.D. 78 (B.C.S.C.)

[33] Similarly, in A.U.P.E. v. Edmonton Sun (1986), 39 C.C.L.T. 143 (Alta. Q.B.), 25 prison guards who were not individually named by the newspaper succeeded in a defamation action arising from the paper's comments that the correctional staff at the prison were "goon guards", "bumbling yo-yo's", and "a joke".

[34] J.S. Williams, The Law of Defamation in Canada (Toronto: Butterworth & Co. (Canada) Ltd., 1976) at 61. There are no limitations on the manner in which defamatory matter may be published: Brown, supra, note 4 at 249-250.

[35] Although the defendant may still be liable for its accidental publication if the defendant should have foreseen that the statement would reach a third party: Williams, The Law of Defamation, ibid. at 62.

In general, a defendant will be liable for the further republication of the statement by the third party to others in situations where the republication is the natural and probable consequence of the original publication[36]; where the defendant authorized the republication[37]; or where the person to whom the original publication was made is under a moral duty to republish those words to others[38]. In relation to the media in particular, some courts have held that the original media publisher of the defamation will not be liable for the defamation's republication by other media, since such republication is not the natural and probable consequence of the initial publication[39] .

However, in other cases, the courts have held that the original media publisher will indeed be liable for such republication. In Vogel v. Canadian Broadcasting Corp.[40], for example, the C.B.C. was held liable for the defamation's republication by other media on the basis that it had created the opportunity for other media to attack the plaintiff in this way and that it was foreseeable and predictable that other media would use this opportunity.

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[36] Day v. Day (1980), 82 A.P.R. 487 (Nfld. S.C.T.D.); Basse v. Toronto Star Newspapers Ltd. (1983), 4 D.L.R. (4th) 381 (Ont. H.C.); Chinese Cultural Centre of Vancouver. v. Holt (1978), 87 D.L.R. (3d) 744 (B.C.S.C.).

[37] Smith v. District of Matsqui (1986), 4 B.C.L.R. (2d) 242 (S.C.); Gatley, supra, note 4 at para. 267.

[38] As was the case in Bordeaux v. Jobs (1913), 6 Alta L.R. 440 (S.C.), in which the defendant told an engaged woman's father that his daughter's fiance already had a wife. While this statement was defamatory, the defendant was not held liable for the father's republication of the statement to his daughter, since this was a natural consequence of the defendant's act and since the father had a moral obligation to tell his daughter of this.

[39] See, for instance, Basse v. Toronto Star Newspapers Ltd., supra, note 36.

[40] (1982), 35 B.C.L.R. 7 (S.C.). See also Chinese Cultural Centre v. Holt, supra, note 36.

E. ELEMENTS THAT THE PLAINTIFF IS NOT REQUIRED TO PROVE

Defamation law presumes the existence of certain elements in the plaintiff's favour[41]. For instance, an accused who brings a defamation action does not have to show that the defamatory statement was false[42] . Likewise, the accused is not required to prove that the media defendant published the defamatory statement with malice, for malice is implied from the mere publication of the defamation[43]. This type of malice is referred to as "implied malice" or "malice in law"[44].

Similarly, in Canadian jurisdictions where a distinction is no longer drawn between libel and slander, the accused need not prove that he or she suffered damage from the defamation[45]. In those Canadian jurisdictions where this distinction still exists, however, an accused who sues a media defendant for slander, which is spoken defamation or defamation in some transitory form, will have to establish special damages, for slander is not actionable without proof of such special damage[46]. However, if the accused sues for libel, which is written defamation or defamation in some permanent form, the accused will not have to establish damages: libel is considered actionable without proof of special damages. This distinction between libel and slander is based on the belief that damages are more likely to result from libel, since it is in a more permanent form than slander, is thus more widely distributed and far-reaching than is slander, and is therefore more likely to cause damage.[47]

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[41] Elliott v. Friesen (1984), 6 D.L.R. (4th) 338 (Ont. C.A.), aff'g (1982), 136 D.L.R.(3d) 281 (Ont. H.C.), leave to app. ref. (1984), 55 N.R. 274 (S.C.C.); Pangilinan v. Chaves (1988), 52 Man. R. (2d) 86 (Q.B.), damages disc. at (1988), 54 Man. R. (2d) 163 (Q.B.).

[42] However, the defence of justification gives the defendant the opportunity to rebut this presumption and to show that the statement was indeed true: discussed below in relation to the defences available to a defendant.

[43] This is stated in many cases: see, for instance, Mack v. North Hill News Ltd., supra, note 23; Mitchell v. Victoria Daily Times, supra, note 23; Cherneskey v. Armadale Publishers Ltd., supra, note 10.

[44] The issue of malice also arises in relation to two defences: qualified privilege and fair comment. If the defendant can establish either of these defences, this "implied malice" disappears and the defendant is presumed to have made the statement in good faith. The plaintiff can defeat these defences by rebutting this presumption and showing that the defendant was in fact motivated by malice, which is referred to in this context as "malice in fact", "actual malice", or "express malice": Brown, supra, note 4 at 731-734; Porter & Potts, supra, note 4 at para. 660.

[45] In Alberta, for instance, s.1(b) of the Defamation Act states that "defamation" means libel or slander, thus removing the traditional distinction between these two types of defamation. s.2(2) of the Act goes on to state that where defamation is proved, damage shall be presumed.

It should be noted that modern forms of communication do not easily fall into one category or the other. For instance, radio broadcasts are often based on written scripts, and thus have elements of both libel and slander. As a result, the traditional definitions of libel and slander have become blurred. As Gatley puts it[48],

> The reason for the distinction between libel and slander... has been completely destroyed by the modern systems of broadcasting by which defamatory words uttered by one person may be disseminated over the whole world.

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[46] Except in four situations: slander is actionable without proof of special damage if it imputes a loathsome or contagious disease to the plaintiff; adversely reflects on the plaintiff's business, trade, or occupation; imputes the commission of a criminal offence to the plaintiff; or imputes unchastity to a female plaintiff. These exceptions are set out in many cases: see, for instance, Conyd v. Brekelmans (1971),18 D.L.R. (3d) 366 (B.C.S.C.). Also see Williams, The Law of Defamation, supra, note 34 at 50-53.

In relation to the imputation of a criminal offence, it is clear that in order for the slander to be actionable without proof of special damage, it must impute to the plaintiff the commission of a specific crime punishable under the Criminal Code by imprisonment: not every act of wrongdoing is considered to be a "crime" of sufficient gravity allowing liability without proof of special damage. See, for instance, Dubord v. Lambert, [1928] 3 D.L.R. 538 (Alta. S.C.A.D.); Bureau v. Campbell, [1928] 3 D.L.R. 907 (Sask. C.A.), app. dis. (1928), 2 D.L.R. 205 (S.C.C.); McDonald v. Mulqueen (1922). 53 O.L.R. 191 (H.C.); Lever v. George, [1950] O.R. 115 (H.C.); Robertson v. Robertson (1921), 67 D.L.R. 496 (Alta. S.C.); Knowles v. Goldt, [1950] 2 W.W.R. 1242 (Sask. C.A.).

[47] K.R. Evans, "Defamation in Broadcasting" (1979) 5 Dalhousie L.J. 659 at 660; P. Johns et al., "Defamation on Cable Television Systems: The Legal and Practical Problems" (1970) 2 Can. Communic. L. Rev. 15 at 16.

[48] Supra, note 4 at para. 146.

As a result, some jurisdictions, such as Alberta, have abolished the distinction between libel and slander and have made defamation in general actionable without proof of damages[49].

III. DEFENCES

Once the accused has established the basic elements of a defamation action, the onus then shifts to the media defendant to establish any available defences. If the media defendant can indeed establish defences, the onus will shift back to the accused to disprove those defences. Four major defences are available to a defendant in a defamation action: privilege; justification; fair comment; and consent. Each is briefly discussed below.

A. PRIVILEGE

The defence of privilege arises on occasions when the courts consider that vital social purposes and interests require certain types of statements to be protected even though those statements may be defamatory[50]. These occasions arise in three contexts: where individuals must be able to speak freely in the performance of their duties without fear of being sued for defamation ("absolute privilege"); where the maker and the receiver of the defamation have a duty or interest to make and to receive the statement ("qualified privilege"); and where the media reports on public proceedings or public documents ("reporting of public proceedings privilege"). While this last type of privilege will be of most use to a media defendant who is being sued for defamatory pre-trial publicity, all three types of privilege are briefly discussed below.

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[49] For a more detailed analysis of the distinction between libel and slander, see Brown, supra, note 4 at 289-300; Williams, The Law of Libel and Slander, supra, note 4 at 45-52; Gatley, supra, note 4 at paras. 141-163.

[50] As W. Tarnopolsky states in "Freedom of the Press", in W. Tarnopolsky et al., Royal Commission on Newspapers, Vol. 3 (Ottawa: Minister of Supply and Services Canada, 1981) 1 at 32, this defence applies "...in circumstances where it is considered that the public interest in free speech overrides the right of private individuals". For a detailed discussion of the defence of privilege, see Brown, supra, note 4 at 401-667.

1. Absolute Privilege

Absolute privilege is intended to ensure that individuals in government and judicial positions can freely discuss their business matters without being inhibited by the fear of being sued for defamation[51] . As the Law Reform Commission of British Columbia puts it[52], this

> ...drastic limitation on the law's protection of individual reputation is reserved for occasions of great public importance where the necessity to encourage frank discussion and disclosure without the inhibiting fear of liability overrides the need to protect reputation.

In relation to individuals in the judicial system, statements made during or incidental to the processing or furtherance of judicial proceedings fall within this defence[53]. Thus, absolute privilege applies to words spoken by a witness at a preliminary inquiry[54]; to comments contained in a medical report prepared by a doctor prior to trial[55]; and to statements made in a statement of claim or at an examination for discovery[56]. This defence also applies to statements made in relation to tribunals and quasi-judicial proceedings, providing that the tribunal exercises functions similar to those exercised by a court of justice[57].

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[51] C. F. Beckton, The Law and the Media in Canada (Toronto: The Carswell Company Limited, 1982) at 31.

[52] Report on Defamation, 1985, at 30.

[53] Brown, supra, note 4 at 401.

[54] Canada v. Lukasik, supra, note 24.

[55] Fabian v. Margulies (1985), 53 O.R. (2d) 380 (Ont. C.A.).

[56] Razzell v. Edmonton Mint Ltd. (1981), 29 A.R. 285 (Q.B.).

The defence of absolute privilege is not defeated by malice. Thus, defamatory statements made upon occasions of absolute privilege are protected even if they were made with malice[58].

In relation specifically to a media defendant which is being sued by an accused on the basis of defamatory pre-trial publicity, the media defendant will generally be precluded from using the defence of absolute privilege. This defence protects individuals in senior government and judicial positions who make certain types of defamatory statements: it does not protect media defendants which subsequently report those defamatory statements.

2. Qualified Privilege

Qualified privilege arises where a person makes a statement in the discharge of some legal, social, or moral duty to another person who has a corresponding interest or duty to receive it[59]. The test for determining when this occasion exists is whether an average person of ordinary intelligence and moral principle would consider it a duty to communicate the information to the persons who received it[60].

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[57] O'Connor v. Waldron, [1935] 1 D.L.R. 260 (P.C.), where absolute privilege did not extend to a Combines Investigation Act inquiry; Sussman v. Eales (1985), 1 C.P.C. (2d) 14 (Ont. H.C.), where it applied to proceedings before the Complaint Committee of the Royal College of Dental Surgeons; Boyachyk v. Dukes (1982), 37 A.R.199 (Q.B.), where it applied to Police Act complaint proceedings; Voratovic v. Law Society of Upper Canada (1978), 20 O.R. (2d) 214 (H.C.), where it applied to complaint proceedings held by the Law Society.

[58] Law Reform Commission of British Columbia, supra, note 52 at 30.

[59] Hebert v. Jackson, [1950] 2 D.L.R. 538 (Ont. H.C.), aff'd in part [1951] 1 D.L.R. 13 (Ont. C.A.); Parks v. Canadian Association of Industrial, Mechanical & Allied Workers (1981), 122 D.L.R. (3d) 366 (B.C.S.C.). In essence, the defence of qualified privilege operates to protect many honest transactions which occur in the daily conduct of human affairs: Davies & Davies Ltd. v. Kott (1979), 9 C.C.L.T. 249 (S.C.C.).

This defence has been used in a wide variety of circumstances. For instance, it has operated to protect a letter written by an employer concerning an employee's character and conduct which was sent to the person who had recommended the employee[61]; to protect an employee who thought he saw a customer shoplifting and reported it to his manager[62]; to protect a consumer columnist whose article stated that the plaintiff was trying to sell defective and dangerous goods[63]; and to protect a high-ranking official who spoke to the media about a civil servant's demotion for alleged dereliction of duty[64].

Qualified privilege also protects defamatory statements made by a defendant in the protection of his or her own interest. Thus, this defence protects defamatory statements made by a person responding to an attack on his or her professional integrity, reputation, or conduct[65].

This defence can be lost in three circumstances. First, while the defendant is not required to pick and choose his words with the "greatest nicety"[66], the privilege may be lost if he or she goes beyond matters which were reasonably relevant to the imputations initially made against the defendant[67]. Second, this defence may be lost if the defamation is published to the general public[68], such as where the defamatory statements are made in the presence of the media, and are then published by the media to the general public. Third, this defence may be lost if the plaintiff establishes that the defendant made the defamation with malice[69]. This type of malice, which is known as express malice[70], can be established by either intrinsic evidence, which is evidence derived from the words themselves or from the circumstances of their publication, or by extrinsic evidence, which is evidence of facts unconnected with the publication itself showing improper or indirect motives[71] . Thus, malice can be established where the defendant lacks belief or unreasonably believes in the defamation's truth; where the defamatory statements are disproportionate to the occasion; and where the defendant's dominant motive behind the making of the defamation was spite, ill-will, or some other improper motive not connected with the privilege[72].

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[60] Brown, supra, note 4 at 465; Beckton, The Law and the Media in Canada, supra, note 51 at 35.

[61] Lawrence v. Barker (1968), 68 D.L.R. (2d) 597 (B.C.S.C.).

[62] Clarke v. Austin (1974), 51 D.L.R. (3d) 598 (B.C.S.C.).

[63] Camporese v. Parton(1983), 150 D.L.R. (3d) 208 (B.C.S.C.).

[64] Stopforth v. Goyer (1979), 8 C.C.L.T. 172 (Ont. C.A.); rev'g (1978) 87 D.L.R. (3d) 373 (Ont. H.C.). For other examples of qualified privilege, see Fisher v. Rankin (1972), 27 D.L.R. (3d) 746 (B.C.S.C.); Hanly v. Pisces Productions Inc., [1981] 1 W.W.R. 369 (B.C.S.C.); Loos v. Robbins, [1987] 4 W.W.R. 469 (Sask. C.A.); Pleau v. Simpsons-Sears Ltd. (1977), 75 D.L.R. (3d) 747 (Ont. C.A.); Smith v. District of Matsqui, supra, note 37; Newton v. City of Vancouver (1932), 46 B.C.R. 67 (S.C.); Parlett v. Robinson (1985), 33 C.C.L.T. 161 (B.C.S.C.).

[65] Netupsky v. Craig . (1972), 28 D.L.R. (3d) 742 (S.C.C.); Bennett v. Stupich (1981), 125 D.L.R. (3d) 743 (B.C.S.C.).

[66] Brown, supra, note 4 at 521.

In relation specifically to a media defendant who is being sued by an accused on the basis of defamatory pre-trial publicity, the media defendant will in most cases be unable to rely on this defence. Qualified privilege only protects defamatory statements made by individuals who have a legal, moral, or social duty to make those statements to individuals with a corresponding duty or interest in receiving those statements. However, while the media has a right to publish matters of public interest, this right differs from a duty which justifies the publication of defamatory statements[73]. As well, the public rarely has the corresponding interest or duty in receiving defamation which is of the nature required to establish this defence, for the "interest" or "duty" required to justify receiving such defamation differs from curiousity or gossip-gathering[74].

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[67] Douglas v. Tucker, [1952] 1 S.C.R. 275; Whitaker v. Huntington (1980), 15 C.C.L.T. 19 (B.C.S.C.).

[68] Lawson v. Chabot (1974), 48 D.L.R. (3d) 556 (B.C.S.C.); Lawson v. Burns, [1975] 1 W.W.R. 171 (B.C.S.C.); Jones v. Bennett, [1969] S.C.R. 277. But see Stopforth v. Goyer supra, note 64, where the court allowed this defence to succeed even though the defamatory statements were published to the general public.

[69] This is stated in numerous cases. See, for instance, Netupsky v. Craig, supra, note 65; McLoughlin v. Kutasy (1979), 8 C.C.L.T. 105 (S.C.C.); Drouin v. Gagnon (1975), 58 D.L.R. (3d) 428 (Alta. S.C.T.D.); O'Neal v. Pulp, Paper & Woodworkers of Canada, [1975] 4 W.W.R. 92 (B.C.S.C.); Daniel v. Mount Allison University (1976),15 N.B.R. (2d) 373 (S.C.Q.B.D.).

[70] As opposed to implied malice resulting from the mere publication of the defamation itself: discussed above in relation to the elements the plaintiff is not required to prove.

[71] Beckton, The Law and the Media in Canada, supra, note 51 at 37. For a more detailed discussion of malice in general, see Brown, supra, note 4 at 729-775.

[72] See, for instance, Taylor. v. Despard (1956), 6 D.L.R. (2d) 161 (Ont. C.A.); Johnson v. Jolliffe (1981), 26 B.C.L.R. 176 (S.C.); Simms v. Hickey (1988), 71 Nfld. & P.E.I.R. 298 (Nfld. S.C.T.D.); Sun Life Assurance Company of Canada v. Dalrymple, [1965] S.C.R. 302.

A media defendant might be able to rely on this defence, however, where the media, at the request of police, publishes a picture of a suspected individual together with information stating that he or she is wanted by police in connection with a crime. While such a publication would on its face be defamatory, the media would be under a duty to help the police track down a criminal suspect, and the public would have a corresponding duty and interest in receiving this information. Thus, qualified privilege might operate in this limited case to protect the media's pre-trial publication of this defamatory information[75].

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[73] Thus, in Globe and Mail Ltd. v. Boland (1960), 22 D.L.R. (2d) 277 (S.C.C.), the Court stated that the right of a publisher, as a citizen, to report fairly on matters of public interest must not be confused with a duty of the sort which gives rise to an occasion of qualified privilege, and that the journalist is in no higher or more privileged position than is any other citizen. See also Banks v. Globe & Mail Ltd. (1961), 28 D.L.R. (2d) 343 (S.C.C.); Bennett v. Sun Publishing Co. (1972), 29 D.L.R. (3d) 423 (B.C.S.C.), where the court stated that the freedom of a journalist is an ordinary part of the freedom of the subject and that a journalist has no greater rights of privilege than an ordinary citizen.

[74] See, for instance, Linden, supra, note 2 at 656; Gatley, supra, note 4 at para. 535. Also see McGugan v. Davidson (1984), 58 N.B.R. (2d) 103 (Q.B.T.D.); England v. Canadian Broadcasting Corp., supra, note 26; Littleton v. Hamilton (1974), 47 D.L.R. (3d) 663 (Ont. C.A.), leave to app. ref. at 663*n*.

[75] This situation does not appear to have yet arisen in Canadian law. However, a comparable situation has arisen where the defendant, in the presence of police, accused

3. Report of Public Proceedings Privilege

While neither absolute nor qualified privilege is generally available to a media defendant, a limited type of privilege does exist both at common law and by statute which protects the media in its reporting of certain types of information. This privilege arises in relation to the reporting of judicial proceedings, legislative proceedings, and public meetings and documents[76].

In relation to the reporting of judicial proceedings such as preliminary inquiries and criminal trials, at common law the media is allowed to make a fair and accurate report of proceedings in open court, even if the report includes the quotation of defamatory statements uttered in court, provided that the report is substantially correct and is not made maliciously[77]. Various provincial defamation acts have set out a similar statutory type of privilege[78].

Thus, the media may be protected by both common law and by statute if it accurately and fairly reports on events occurring at open criminal court proceedings, even if the plaintiff was defamed during those proceedings. For instance, a media defendant which accurately reported the proceedings of a pre-trial proceeding such as a bail hearing or of a preliminary inquiry would

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the plaintiff of theft: Knowles v. Goldt, supra, note 46. In that case, qualified privilege did not protect the defendant because he had uttered the defamation not in a desire to bring the wrongdoer to justice, but rather in a desire to recover or obtain compensation for the items allegedly stolen.

[76] For a detailed discussion of this privilege, see Brown, supra, note 4 at 621-667. This common-law privilege extends not only to the media, but also to private individuals: Wesolowski v. Armadale Publishers Ltd. (1980), 112 D.L.R. (3d) 378 (Sask. Q.B.).

[77] Ibid. at 621-622. See also Vroman v. Vancouver Daily Province Ltd., [1942] 2 D.L.R. 456 (B.C.C.A.); Stieb v. Vernon News , [1947] 4 D.L.R. 397 (B.C.S.C.).

[78] In Alberta, s.11(1) of the Defamation Act provides that a fair and accurate report, published by a paper or by broadcasting, of proceedings publicly heard before a court is absolutely privileged if it contains no comment, is published within 30 days after the proceedings, and contains nothing seditious, blasphemous, or indecent. s.11(2) goes on to provide that this privilege does not apply if the defendant fails to publish a reasonable statement of explanation or contradiction by the plaintiff after being requested to do so by the plaintiff. This statutory privilege applies only to the media.

be protected by this defence, and an accused would not be able to recover compensation for damage to his or reputation caused by this reporting[79].

B. JUSTIFICATION

The second major defence available to media defendants which are being sued for defamatory pre-trial publicity is justification. This defence is an assertion that the defamatory statements were true and, if successful, is a complete defence to a defamation action. As one commentator puts it,

> The truth of the imputation is an answer to the action, not because it negatives malice, but because the plaintiff has no right to a character free from that imputation, and if he has no right to it, he cannot in justice recover damages for the loss of it.[80]

In order to establish justification, the media defendant must prove the truth of all material allegations of fact contained in the defamatory statement[81], although the defendant need not prove the truth of every detail of the words used[82]. The defendant's own belief in the defamation's truth is irrelevant in determining whether the defence of justification can be established[83]. While justification is the simplest of all defences, it is also the most dangerous: an unsuccessful plea of justification will usually aggravate the damages awarded against the defendant[84].

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[79] Of course, if the media publishes information which has been the subject of a prior restraint, the media will be punished for such publication, even where the information was revealed in an open court proceeding: see Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests, and Preliminary Inquiries".

[80] Gatley, supra, note 4 at para. 351. This defence is discussed in depth in Brown, supra, note 4 at 361-387.

[81] Boys v. Star Ptg. and Pub. Co., [1927] 3 D.L.R. 847 (Ont. S.C.A.D.); Gatley, supra, note 4 at para. 356.

[82] Baxter v. Canadian Broadcasting Corp., supra, note 12. To put it another way, the defendant must prove that the gist or the "sting" of the libel is true: Parlett v. Robinson, supra, note 64.

[83] Indeed, as Brown points out, supra, note 4 at 361, if the defendant can not establish the truth of the defamation, he or she will be liable even though he or she may have published the defamation with an honest belief in its truth based upon reliable information supplied by another party. Honest belief is relevant, however, in mitigation of damages.

The defence of justification may arise in a variety of contexts concerning pre-trial publicity about an accused's involvement in the criminal justice system. For instance, justification is often raised as a defence where defamatory material imputes the commission of a criminal offence to an individual. To rely on this defence, the media defendant must establish that the accused did indeed commit the offence. In Canada, proof of conviction will likely be accepted as the best evidence of commission[85].

If the accused was never convicted of the criminal offence imputed to him or her, the media defendant must prove that the accused did commit the offence. While initially the courts required this to be proven beyond a reasonable doubt[86], it now appears that this must be proven simply on the balance of probabilities[87]. Thus, where a media defendant publishes editorials stating that the plaintiff had deliberately set fire to his apartment[88], the defendant, in order to establish justification, must prove on the balance of probabilities that the plaintiff had in fact done this[89].

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[84] As Carter-Ruck points out, supra, note 4 at 93, the jury is entitled to consider, when awarding damages, the effect of a failed plea of justification and is entitled to compensate the plaintiff not only for the actual defamation itself, but also for the insult to the plaintiff and for the attendant publicity of contending in court that the defamation was well-founded. See also Farrell v. St. John's Publishing Co., supra, note 20; Halluk v. Brown, supra, note 31.

[85] Traditionally, English common-law held that proof of conviction was insufficient to establish the commission of an offence: Williams, The Law of Libel and Slander, supra, note 4 at 8. Thus, the defendant would have to show not only the conviction but also the commission of the offence. This has, however, changed, and in England, proof of the plaintiff's conviction is now conclusive evidence of the plaintiff's commission of the offence: Brown, supra, note 4 at 386.

[86] Mays v. Degerness, [1929] 4 D.L.R. 771 (Sask. K.B.); Meier v. Klotz, [1928] 4 D.L.R. 4 (Sask. C.A.). Thus, the defendant was required to prove beyond a reasonable doubt that the plaintiff had committed the offence imputed to him or her.

[87] York v. Okanagan Broadcasters Ltd., [1976] 6 W.W.R. 40 (B.C.S.C.); Pangilinan v. Chaves, supra, note 41. Also see Brown, supra, note 4 at 385; Linden, supra, note 2 at 655.

[88] As was the case in Farrell v. St. John's Publishing Co., supra, note 20. Given the fact that the plaintiff was discharged at the preliminary inquiry, it would have been difficult for the defendant to prove the commission of this offence.

If the media defendant reports that the accused has been charged with a criminal offence, the defendant can establish justification by showing that the charge was, in fact, made[90]. If the defendant states that there were reasonable grounds for this charge, the defendant must prove that those reasonable grounds did exist in addition to proving that the charge was made[91]. If the defendant states that the charge was well-founded, the defendant must prove that the accused is guilty of that offence[92].

Where the media defendant has made defamatory comments about an accused's background or character, the defendant can rely on justification if it can be proven that the comments were true. If, for instance, the defendant alleged that the accused had a bad reputation in the community, the defendant would have to lead evidence establishing this reputation[93].

It should be noted that justification is an absolute defence to a defamation action. Thus, a defendant who maliciously publishes defamatory material about an accused will not be liable for that defamation if the material is true. For instance, a media defendant can maliciously publish true details of a an accused's past life, such as the accused's prior criminal record, even if this reflects badly on the accused who has since reformed and changed his or her ways. While such publication may amount contempt of court if it interferes with the accused's pending criminal trial, the defence of justification will prevent the accused from recovering compensation for the damage caused to his or her reputation by that publication[94].

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[89] However, while the standard of proof required is the balance of probabilities, the actual level of probability may vary according to the seriousness of the allegations against the accused. In other words, the more serious the allegation, the higher the degree of probability that will be required to support a plea of justification: Porisky v. Scott, supra, note 8.

[90] Brown, supra, note 4 at 375.

[91] Ibid.

[92] Ibid.

[93] Williams, The Law of Defamation, supra, note 34 at 138. Given the difficulty in establishing the truth of many comments made about an accused's involvement in the criminal justice system, it has been suggested that the media's safest approach is to limit reports to statements that a person has been charged with or convicted of a specific offence, unless there is good evidence of the truth of any further statements concerning that person's involvement in the criminal justice system: Beckton, The Law and the Media in Canada, supra, note 51 at 45.

C. FAIR COMMENT

The third defence to a defamation action is fair comment[95]. This defence may be of use to a media defendant which is being sued for defamatory pre-trial comments and editorials about an accused and his or her involvement in the criminal justice system. In order to rely on the defence of fair comment, the media defendant must establish that the words complained of are a comment; that the comment is fair; that it is based on true facts; and that it concerns a matter of public interest. These elements are outlined below.

1. Words must be a Comment and not a Statement of Fact

The media defendant must first establish that the defamatory words complained of are a comment and not a statement of fact. A comment has been defined as "the subjective expression of opinion in the form of a deduction, inference, conclusion, criticism, judgement, remark or observation which is generally incapable of proof"[96]. Thus, the media defendant must establish that the defamatory words contained in the pre-trial publicity are "recognizable to the ordinary reasonable man" as a comment[97] or as a comment containing inferences of fact[98]. If the words are statements or allegations of fact, the defence will fail[99].

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[94] As Gatley puts it, supra, note 4 at para. 801, "since the common law gives an absolute defence in respect of the publication of matter which is true, even if the publication was unworthy and malicious, there is no remedy in civil proceedings for the revelation of past-wrongdoing, however much the wrongdoer may have reformed, and for however long he has led an honest and socially valuable life".

[95] For further discussion of this defence, see Brown, supra, note 4 at 669-728.

[96] Ibid. at 670.

2. Comment must be Fair

Second, the media defendant must establish that the defamatory comments in the pre-trial publicity are fair. A comment is fair if it arises in the spirit of free discussion by an individual with an honest belief in the opinion expressed and is based upon facts truly stated by that individual[100].

The honest belief requirement has created difficulties in the operation of this defence. In relation to defamatory comments contained in editorials, where the person making the comment is also the person publishing it, the honest belief requirement has posed few problems: the defendant will be able to directly testify as to his or her honest belief in the comment's truth. However, in relation to defamatory comments contained in "letters to the editor", where the person making the comment is not the person publishing it, there has been some question as to whether a defendant who publishes that comment must honestly believe in its truth or need only believe that the person who made the comment honestly believed in its truth.

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[97] Vander Zalm v. Times Publishers. (1980), 109 D.L.R. (3d) 531 (B.C.C.A.), rev'g (1979), 96 D.L.R. (3d) 172 (B.C. S.C.).

[98] Skarsgard, supra, note 31 at 308. As Skarsgard points out at 309, there is a "murky distinction" between comment and fact.

[99] As was the case in Bonham v. Pure Water Association, supra, note 28.

[100] Brown, supra, note 4 at 686. In Vogel v. Canadian Broadcasting Corp., supra, note 40, the court stated that in order to be fair, the comment must not impute corrupt and dishonourable motives to the person whose conduct is criticized except insofar as such imputations are warranted by the facts. This was phrased differently in Baxter v. Canadian Broadcasting Corp., supra, note 12 at 158, where the court stated the test to be whether any honest man, no matter how prejudiced he may be or how exaggerated or obstinate his views, would have written this comment.

In Cherneskey v. Armadale Publishers Ltd.[101], a majority of the Supreme Court of Canada held that a defendant who pleads fair comment must establish his or her honest belief in the published comments. Based on this decision, media defendants which publish the opinions of other persons must honestly believe in those opinions in order to rely on this defence[102].

This decision has been criticized[103] on the basis that it restricts the media's freedom to publish a wide variety of divergent opinions on matters of public interest, since newspapers and other media will be unwilling to publish opinions they do not agree with. As a result, several Canadian jurisdictions have amended their defamation laws to allow the defence of fair comment to succeed even where the defendant who publishes another person's opinion does not hold that opinion[104].

3. Comment must be based on True Facts

Third, the media defendant must establish that the facts on which the defamatory pre-trial publicity was based were true. For instance, where the media defendant publishes an editorial based entirely on the assumption that an individual had committed the crime of arson[105], the defence of fair comment will fail if the defendant cannot establish that the plaintiff did commit this crime[106].

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[101] Supra, note 10. There, the defendant newspaper published a letter written by two students accusing the plaintiff alderman of racism. The plaintiff sued. The defendant argued that the statement was protected by the defence of fair comment. The majority disagreed, holding that the defendant had to show its honest belief in the truth of the letter it had published. Because the defendant newspaper had not established its honest belief in the letter's truth, the defence failed.

[102] This decision has been followed in several other decisions: see, for instance, A.U.P.E. v. Edmonton Sun, supra, note 32; Vogel v. Canadian Broadcasting Corp., supra, note 40.

[103] See, for instance, M.R. Doody, "Comment" (1980) 58 Can. Bar Rev. 174; Institute of Law Research and Reform, Report No. 35: Defamation: Fair Comment and Letters to the Editor (University of Alberta, 1979); L.N. Klar, "The Defence of Fair Comment" (1979), 8 C.C.L.T. 149.

[104] In Alberta, s.9(1) of the Defamation Act provides that "if a defendant published an opinion expressed by another person, other than an employee or agent of the defendant, that is alleged to be defamatory, a defence of fair comment shall not fail by reason only that the defendant did not hold that opinion". For a discussion of this legislation, see Smith v. Snider (Dec. 12, 1988) (Alta. C.A.) [unreported].

4. Comment must be on a Matter of Public Interest

Finally, the media defendant must establish that the defamatory comment contained in the pre-trial publicity was made concerning a matter of public interest. In the words of one commentator,

> ...a comment may be of public interest because of the importance of the person about whom the words are spoken or because of the event, occasion or circumstances which give rise to the comment. Where it is the occasion which induces the comment, it must be shown to be one which invites public attention, or about which the public has some substantial concern because it affects the welfare of citizens, or one to which considerable public notoriety or controversy has attached. It may also be public interest because the plaintiff has placed the matter before the public for its approval or attention[107].

Thus, comments made by a media defendant calling a landlord a slum landlord without morals, principles, or conscience are comments made on a matter of public interest, since the existence of substandard housing in the community is clearly a matter of public interest[108].

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[105] Farrell v. St. John's Publishing Co., supra, note 20. Indeed, the plaintiff was discharged at the preliminary inquiry.

[106] Likewise, where the defendant's comments about an expert witness's testimony are based on false assertions of fact to the effect that the witness was professionally dishonest and would give false evidence for a price, the defendant will be unable to rely on this defence: Barltrop v. Canadian Broadcasting Corp. (1978), 36 A.P.R. 637 (N.S.S.C.A.D.), rev'g (1977), 36 A.P.R. 666 (N.S.S.C.T.D.). Other cases stating that comments must be based on true facts include Doyle v. Sparrow (1979), 106 D.L.R. (3d) 551 (Ont. C.A.); Van Baggen v. Nichol (1963), 38 D.L.R. (2d) 654 (B.C.S.C.); Holt v. Sun Publishing Co. (1979), 100 D.L.R. (3d) 447 (B.C.C.A.), var'g (1978), 83 D.L.R. (3d) 761 (B.C.S.C.).

[107] Brown, supra, note 4 at 706.

[108] Pearlman v. Canadian Broadcasting Corp. (1981), 13 Man. R. (2d) 1 (Q.B.). Matters of public interest include governmental affairs; the administration of justice; public health

If the media defendant is able to establish these four elements, the accused will not be able to recover monetary compensation for the damage caused to his or reputation by the defamatory comments contained in the pre-trial publicity. It should be noted that the media is in no special position and has no greater right of comment than the ordinary citizen[109]. In other words, a media defendant which seeks to establish this defence in relation to defamatory material published about an accused and the accused's involvement in the criminal justice system will be bound by the same law and will have to establish the same elements as does every other defendant who relies on this defence[110].

It should also be noted that the defence of fair comment can be defeated by malice[111]. Thus, if an accused can establish that the media defendant published the defamatory material with malice[112], the media defendant will not be able to rely on this defence.

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and safety; educational affairs; political events and elections; entertainment and artistic or literary affairs; sports; and public officials and figures: Brown, supra, note 4 at 707-718.

[109] Carter-Ruck, supra, note 4 at 97; Linden, supra, note 2 at 665; Gatley, supra, note 4 at para. 695.

[110] It is interesting to note that the "rolled-up plea" has been popular with the media as a defence, particularly in relation to editorials where facts and comments are closely intertwined: W.H. Kesterton, The Law and the Press in Canada (Toronto: McClelland and Stewart Limited, 1976) at 55. This defence is that insofar as the words complained of are statements of fact they are true, and insofar as they are expressions of opinion they are fair comment made in good faith and without malice on a matter of public interest: Williams, The Law of Libel and Slander, supra, note 4 at 110. Thus, this defence has elements of both justification and fair comment. The advantage in using this defence lay in that the defendant could avoid giving particulars of the facts: Porter & Potts, supra, note 4 at para. 262. However, this plea is now treated as an assertion of fair comment.

[111] Christie v. Geiger, supra, note 15; Kolewaski v. Island Properties Ltd. (1983), 56 N.S.R. (2d) 475 (S.C.T.D.).

[112] The discussion of express malice, as discussed above in relation to the defence of qualified privilege, applies equally to the defence of fair comment.

D. CONSENT

The fourth major defence available to a media defendant is consent. Consent is a complete defence to a defamation action, and arises in situations where the plaintiff agrees to the publication of the defamation[113] . The test for determining whether the plaintiff agreed is whether the ordinary person in the plaintiff's position would realize that the publication had been consented to[114] . The defendant must show that the plaintiff's consent was active and not passive[115]. As Hamilton, J. sums up this defence,

> Consent is a narrow defence to defamation, one not often seen and one where the consent must be clearly established. Consent must be given or be able to be inferred with respect to each publication of defamatory material. Were it otherwise, consent to the merest publication would open the door to wide dissemination that might be very damaging and never intended to be authorized by the person giving the initial consent.[116]

In relation to defamatory pre-trial publicity about an accused and his or her involvement in the criminal justice system, it might be possible for a media defendant to avoid liability for the defamation by showing that the accused consented to the publication of the defamatory material. This situation is, however, unlikely to arise in practice.

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[113] For instance, in Jones v. Brooks (1974), 45 D.L.R. (3d) 413 (Sask. K.B.), the plaintiff hired private detectives to interview the defendants in order to get the defendants to make slanderous remarks about the plaintiff. The detectives were successful, and the plaintiff then sued the defendants for defamation. The court dismissed his action on the grounds that he had consented to the defamation since he knew that their response to the detectives he had hired would be defamatory. For further discussion of this defence, see Brown, supra, note 4 at 389-399.

[114] Beckton, The Law and the Media in Canada, supra, note 51 at 47.

[115] Williams, The Law of Defamation, supra, note 34 at 106.

[116] Syms v. Warren. (1976), 71 D.L.R. (3d) 558 at 563 (Man. Q.B.).

E. OTHER DEFENCES

While the four defences discussed above are the main defences which arise in defamation actions, a number of other defences are available. For instance, the defence of innocent dissemination exists to protect innocent disseminators of defamatory material, such as libraries and booksellers, provided that they had no knowledge of the defamation and had no reason to suspect the material was defamatory[117]. Likewise, a plaintiff's non-compliance with essential requirements of provincial defamation laws may be raised by the defendant as a defence[118].

While these defences, as well as the four major defences discussed above, are all available to media defendants involved in defamation actions arising from prejudicial pre-trial publicity, perhaps the best defence available to the media is to publish information with care and accuracy. As Beckton put it[119],

> The best defence against a defamation action, however, is the exercise of care in writing articles or scripts for radio and television [and other media, such as newspapers] by checking that the sources are reliable and the information accurate.

IV. **REMEDIES**

An accused who brings a defamation suit against a media defendant will usually seek damages as a remedy. In some cases, the accused may also seek an injunction, either in addition to or instead of damages. These remedies are discussed below[120].

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[117] Brown, supra, note 4 at 284; Williams, The Law of Libel and Slander, supra, note 4 at 115-116.

[118] For instance, a plaintiff's failure to provide notice of intention to bring the action within the time limits specified in provincial defamation laws, such as s.13 of Alberta's Defamation Act, can be raised by the defendant as a defence. See, for instance, Barcan v. Zorkin (1987), 55 Alta. L.R. (2d) 210 (C.A.).

[119] The Law and the Media in Canada, supra, note 51 at 31.

A. DAMAGES

In most defamation actions, the defamatory publication will have been widely distributed, and the accused will seek damages from all those who participated in its publication and circulation[121]. Damages in defamation actions are usually awarded under three heads: compensatory, aggravated, and punitive[122]; have no fixed range; and are determined by various factors taken into consideration by the courts. These elements are considered below.

1. Types of Damages Awarded in Defamation Actions

(a) Compensatory damages

Compensatory damages, which may be special or general, are intended to compensate an individual for the injury caused to his or her reputation by the defamation, and in addition "...may include compensation for such injuries as mental suffering, anguish, embarrassment, humiliation and any actual or anticipated pecuniary loss or social disadvantage"[123].

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[120] For a detailed discussion of these remedies, see Brown, supra, note 4 at 1003-1091.

[121] In Thomson v. Lambert, [1938] 2 D.L.R. 545, the Supreme Court of Canada stated that all those who participate in the publication and circulation of the defamation will be liable as joint tortfeasors. The exception to this rule is innocent disseminators.

[122] Munro v. Toronto Sun (1982), 21 C.C.L.T. 251 (Ont.H.C.). Some courts have recognized only two heads of damages--compensatory and punitive: see, for instance, Caldwell v. McBride, supra, note 14. In such cases, the courts will treat factors which would normally lead to aggravated damages as factors increasing the amount of compensatory damages to be awarded.

[123] Brown, supra, note 4 at 1003.

(b) Aggravated Damages

Aggravated damages are sometimes awarded either in augmentation of compensatory damages or as an independent head of damages. Aggravated damages are allowed where the defendant's behaviour has somehow increased the plaintiff's anguish and humiliation[124] but is not serious enough to warrant the imposition of punitive damages. These damages have been awarded where the defendant advances a plea of justification which fails[125]; fails to apologize for or retract the defamation[126]; is clearly motivated by malice[127]; or adopts a high-handed, insulting, or oppressive attitude[128]. An accused who sues a media defendant on the basis of defamatory pre-trial publicity may thus be able to recover aggravated damages when the media defendant's behaviour warrants the imposition of such damages.

(c) Punitive Damages

In exceptional circumstances, the court may award punitive damages to express its outrage or disapproval of a defendant's conduct and to deter members of the public generally, and the defendant particularly, from similar conduct[129]. Punitive damages have been awarded where the court wishes to show its disapproval of a defendant who was motivated by a desire for revenge against a plaintiff[130]; of a defendant characterized as a man who, in pursuit of personal gain, would not stop at destroying the reputations of those he saw as against him[131]; of a defendant's outrageous and reprehensible conduct[132]; and of a defendant's vindictive, insolent, and consciously contemptuous attitude towards the plaintiff's right to his good reputation[133].

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[124] Walker v. C.F.T.O. (1987), 39 C.C.L.T. 121 (Ont. C.A.).

[125] See, for instance, Farrell v. St. John's Publishing Co., supra, note 20; Lawson v. Burns, supra, note 68. Aggravated damages will also be awarded where the defendant does not specifically allege justification but continues to reaffirm the defamation during the trial: for example, see Christie v. Geiger, supra, note 15; Canada v. Lukasik, supra, note 24.

[126] Barltrop v. Canadian Broadcasting Corp., supra, note 106.

[127] Hubert v. DeCamillis (1963), 44 W.W.R. 1 (B.C.S.C.). In some cases, a harsh and excessive use of words in the defamatory publication may be evidence of malice sufficient to aggravate the damages: Christie v. Geiger, supra, note 15.

[128] Schultz v. Porter (1979), 9 Alta. L.R. (2d) 381 (S.C.T.D.).

[129] Brown, supra, note 4 at 1062.

An accused whose reputation has been destroyed by defamatory pre-trial publicity may be able to obtain punitive damages from the media defendant. Indeed, the courts have often awarded punitive damages against the media when it has behaved in a reckless and irresponsible manner and has abused its great power by destroying an individual's reputation. As one commentator put it, "...punitive damages will be awarded against newspapers or broadcasters who act high-handedly or fail to take appropriate steps to ensure the accuracy of their comments"[134].

For instance, in Vogel v. Canadian Broadcasting Corp.[135] , the court warded $25,000 in punitive damages against C.B.C. on the basis that C.B.C.'s programs had been a massive attack on the plaintiff's integrity; that C.B.C. had acted in a reckless and deliberately damaging manner; and that it had shown no remorse about the harm caused by the irresponsible abuse of its power[136].

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[130] Roberge v. Tribune Publishers Ltd. (1977), 34 A.P.R. 381 (N.B.S.C.Q.B.D.).

[131] Good v. North Delta-Surrey Sentinel, [1985] 1 W.W.R. 166 (B.C.S.C.), aff'd [1986] 3 W.W.R. 333 (B.C.C.A.).

[132] Johnson v. Jolliffe, supra, note 72.

[133] Goodman v. Kidd, [1986] N.W.T.R. 94 (S.C.). For other situations where punitive damages have been awarded, see Gillett v. Nissen Volkswagen Ltd., [1975] 3 W.W.R. 520 (Alta. S.C.); Thompson v. NL Broadcasting Ltd. (1976), 1 C.C.L.T. 278 (B.C.S.C.); Kolewaski v. Island Properties Ltd., supra, note 111.

[134] J.S. Williams, "Decorum in Defamation", in L.N. Klar, ed., Studies in Canadian Tort Law (Toronto: Butterworth & Co. (Canada) Ltd., 1977) 273 at 284. Such punitive damages are largely intended to act as a deterrent to other media: Kohuch v. Wilson (1988), 71 Sask. R. 32 (Q.B.).

[135] Supra, note 40. See also Booth v. British Columbia Television Broadcasting System, supra, note 33, where the court, when awarding punitive damages against the media, considered the fact that the defendant was motivated by the prospect of profits being made by the defamation.

2. Range of Damages

In a defamation action, damages are "at large", and are thus are not limited to the monetary loss that can be specifically proven by the plaintiff, but can also include intangible or subjective elements. As a result, damages in a defamation action are not capable of precise calculation and cannot be measured by any objective monetary scale. As Brown states, "...the reputation of any person is necessarily an evanescent thing, and it is difficult to calculate an appropriate financial equivalent for its loss"[137].

As a result, there is no fixed range of damages that will be awarded to a successful plaintiff, and it will be difficult for an accused to predict what damages he or she will be awarded if the media defendant is held liable for its defamatory pre-trial publicity. In Canada, damages awarded have ranged from purely nominal[138] damages of $1.00[139] to damages of $135,000[140], with damages generally falling somewhere between $2,000 and $25,000. Underlying all of these damage awards is the courts' recognition that damage awards cannot in many cases fully compensate the plaintiff for the damage done to his or her reputation, particularly when the defamation has been widely disseminated by the media. As Bouck, J., puts it

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[136] Contemptuous or derisory damages are a fourth possible type of damage. Such damages would reflect the fact that while the plaintiff has a valid claim and should succeed in theory, the nature of the claim is such that in practice he or she should be discouraged from bringing such a claim: Williams, The Law of Libel and Slander, supra, note 4 at 134.

[137] Supra, note 4 at 1004. It should be noted that in some provinces, defamation laws limit a plaintiff's recovery to special damages where the defamation was published by the media in good faith, was reasonably believed to be for the public benefit, did not impute the commission of a criminal offence, was made in mistake of the facts, and where the defendant newspaper or broadcaster made a retraction and apology: see, for instance, s.16 of Alberta's Defamation Act.

[138] Awarded in situations where the plaintiff's reputation is only minimally affected by the defamation or where the defendant almost completely succeeds in a plea of justification: Brown, supra, note 4 at 1069.

[139] Leonhard v. Sun Publishing Co. (1956), 19 W.W.R. 415 (B.C.S.C.). Here, the plaintiff suffered no real injury from the defamation since he had no reputation to complain of, having been in prison and having associated with "underworld characters" in"gambling clubs".

[140] Snyder v. Montreal Gazette Ltd., [1988] 1 S.C.R. 494, modifg (1983), 5 D.L.R. (4th) 206 (Que. C.A.), modifg (1978), 87 D.L.R. (3d) 5 (Que. S.C.). In Walker v. C.F.T.O.,

> Radio, television and newspaper commentators have an immense power to harm others through careless and inaccurate statements. Far too often an award of damages does not really even the scales.[141],

3. Factors Considered by the Courts when Awarding Damages

The courts will consider a variety of factors when awarding damages in defamation actions. Such factors include the extent and circumstances of the publication[142]; the plaintiff's efforts to mitigate the damage to his reputation[143]; the absence or presence of an apology by the defendant[144]; the nature and gravity of the publication[145]; the defendant's conduct during the

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supra, note 124, the plaintiff and his company were successful at trial against a W5 news program. The jury awarded total damages in the amount of $1,372,346.36, of which $933,000 were awarded to the corporate plaintiff. The court on appeal allowed the damage award of $25,000 to the personal plaintiff to stand, but did not allow the remaining damages to stand and ordered a new trial.

[141] Neeld v. Western Broadcasting Co. (1976), 65 D.L.R. (3d) 574 (B.C.S.C.).

[142] Wilcox v. Calgary Board of Education (1982), 42 A.R. 6 (Q.B.); Wiley v. Toronto Star Newspapers Ltd. (1988), 65 O.R. (2d) 31 (H.C.). Thus, the wider the circulation or the sloppier and more careless the publication, the greater the damages awarded.

[143] Williams, The Law of Libel and Slander, supra, note 4 at 128.

[144] Smith v. Alexander, [1983] N.W.T.R. 190 (S.C.); Baxter v. Canadian Broadcasting Corp., supra, note 12; Harvey v. Horizon Publications Ltd., supra, note 19. At common law, the presence of an apology mitigates damages, while its absence aggravates damages. Further, many provincial defamation laws provide that an apology will mitigate damages: see, for instance, Defamation Act, R.S.A. 1980, c. D-6, s.4 (dealing with apologies in general) and s.15 (dealing with apologies by the media).

[145] Platt v. Time International of Canada Ltd., supra, note 23; Neeld v. Western Broadcasting Co., supra, note 141. Thus, the more serious and offensive the defamation, the greater the damages that will be awarded to the plaintiff.

action[146]; the plaintiff's position[147] and the defendant's position[148] in the community; an unsuccessful plea of justification[149]; unbalanced trial coverage by a media defendant[150]; the lack or presence of malice[151]; and other proceedings taken against the defendant[152].

B. INJUNCTIONS

The plaintiff in a defamation action may also seek an injunction as a remedy, either in addition to or instead of damages, to prevent the publication of the defamatory material until the time of the defamation trial itself. For instance, in Canada Metal Co. v. Canadian Broadcasting Corp.[153], the plaintiffs sought an order continuing and expanding an injunction until the time of trial. This injunction had restrained the defendants from advertising, publicizing, and broadcasting a programme in which the plaintiffs were allegedly defamed. The injunction was thus sought to prevent publication of the defamatory material until the time of the defamation trial.

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[146] Baxter v. Canadian Broadcasting Corp., supra, note 12. A defendant's high-handed, arrogant, and irresponsible conduct will be punished by greater damages in the same way that fair-minded and reasonable conduct will be rewarded by lower damages.

[147] Bonham v. Pure Water Association, supra, note 28. Since a defamation action is based upon the damage done to an individual's reputation, it follows that the higher the plaintiff's standing and reputation in the community, the greater the injury done by the defamation, and correspondingly the greater the damages awarded.

[148] Likewise, the defendant's own reputation affects the damage award. Where the defendant has a reputation for responsibility and reliability, such as the C.B.C., many people will believe the defendant's defamation and the damages will be greater: Vogel v. Canadian Broadcasting Corp., supra, note 40. By contrast, where the defendant has a poor reputation or is unstable and unreliable, fewer people will believe the defamation, and the damages will be less: McElroy v. Cowper- Smith (1967), 62 D.L.R. (2d) 65 (S.C.C.).

[149] Halluk v. Brown, supra, note 31; Wilcox v. Calgary Board of Education, supra, note 142.

[150] Porter & Potts, supra, note 4 at para. 636.

[151] In some cases, the presence of malice will aggravate the damages: Hubert v. DeCamillis, supra, note 127. In other cases, the absence of malice will mitigate the damages: Tait v. New Westminster Radio Ltd., supra, note 21.

[152] Thus, damages may be less where the defendant has already been subjected to contempt of court or perjury proceedings arising from the defamatory statements. See, for instance, MacKay v. Southam Co. (1955), 1 D.L.R. (2d) 1 (B.C.C.A.) (contempt proceedings); Canada v. Lukasik, supra, note 24 (perjury proceedings).

[153] (1975), 7 O.R. (2d) 261 (H.C.).

The courts are generally very reluctant to grant such preliminary injunctions. This reluctance stems from the courts' desire not to interfere with the fundamental freedoms of expression and of the media[154]. As a result, courts will only grant preliminary injunctions in defamation cases in the most exceptional of circumstances, such as where the words are so clearly defamatory and so obviously impossible to justify that a verdict at trial which accepted the plea of justification as a defence would have to be set aside on appeal as a perverse finding[155]. The courts will also be more willing to grant an injunction in circumstances where there is a very strong likelihood that the defendant will continue repeating the defamation[156].

The courts will usually refuse to grant a preliminary injunction where there is a serious dispute as to the facts, such as a dispute about the defamatory meaning of the words[157]; where there is no irreparable harm to the plaintiff's reputation, and any harm done may be adequately compensated for by monetary damages[158]; and where the defendant intends to raise the defences of justification, qualified privilege, or fair comment[159].

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[154] Evans, supra, note 47 at 665. As Brown, supra, note 4 at 1085 states, "courts are reluctant to use this remedy which has such a chilling effect on speech and the press".

[155] As stated in Canada Metal Co. v. Canadian Broadcasting Corp., supra, note 153; Rapp v. McClelland & Stewart Ltd. (1981), 128 D.L.R. (3d) 650 (Ont. H.C.). See also Church of Scientology of British Columbia v. Radio N.W. Ltd. (1974), 46 D.L.R. (3d) 458 (B.C.C.A.).

[156] As was the case in Kohuch v. Wilson, supra, note 134; Kruger v. Kay (1987), 77 A.R. 274 (Q.B.).

[157] Williams, The Law of Libel and Slander, supra, note 4 at 136.

[158] Porter & Potts, supra, note 4 at para. 7.

[159] Brown, supra, note 4 at 1087-1088. Thus, in Canada Metal Co. v. Canadian Broadcasting Corp., supra, note 153, the court refused the plaintiffs' application to extend the ex parte injunction restraining the defendants' publication of the material in question on the basis that the issue of justification was in dispute.

An accused whose reputation has been damaged by defamatory pre-trial publicity might thus be able to obtain an injunction restraining the media defendant from continuing to publish the publicity until the time of the defamation trial itself. In one case, the court did allow an interim injunction in a situation where publication could prejudice the plaintiff's right to a fair trial before an impartial jury[160]. On the basis of this case, then, it might be possible for an accused whose reputation has been damaged by defamatory pre-trial publicity to ask for an injunction restraining further publication on the basis that the injunction is needed to protect his or her right to a fair trial.

C. OTHER REMEDIES

While damages and injunctions are the usual remedies sought by plaintiffs in defamation actions, other remedies may be possible in some circumstances. For instance, in Rapp v. McClelland & Stewart Ltd.[161], the court refused to order an injunction restraining the defendants from printing, publishing and distributing the book in question. Instead, the court ordered the defendants to use their best efforts to have the plaintiff's name blacked out, in all the copies of the book already in the stores, with a felt pen wherever the name appeared in the book. The court also ordered the defendants not to publish or deliver any further copies containing the plaintiff's name.

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[160] Campbell v. Sun Printing and Publishing Co. (1921), 30 B.C.R. 149 (S.C.). Clearly, this decision illustrates yet again the interrelatedness of contempt of court, procedural safeguards, and the law of defamation: a statement which interferes with the accused's right to a fair trial may be defamatory, lead to contempt of court proceedings, and result in the use of one or more of the procedural safeguards.

[161] Supra, note 155.

V. CRITICISMS OF AND PROPOSALS FOR REFORM OF DEFAMATION

A. INTRODUCTION

While the law of defamation is thus another means by which an accused who is the subject of pre-trial publicity can protect his or her rights, its actual value is often more theoretical than real. In other words, while the law of defamation may appear to be a valuable remedy available to protect and vindicate an accused's reputation when that reputation has been damaged by defamatory pre-trial publicity, major difficulties with this area of law significantly reduce its effectiveness. These difficulties are not associated solely with parties bringing defamation actions, but exist also in relation to defendants. As a result, there have been many criticisms of and many proposals for reform of this area of law.

B. CRITICISMS OF THE LAW OF DEFAMATION

1. General

One of the most common complaints regarding defamation is that it is anachronistic, in that it is an old area of law which has evolved over centuries[162] and which does not now meet the needs of modern society. In the words of the British Columbia Law Reform Commission,

> ...the law of defamation has not kept pace with technology, nor with the contemporary needs of a society in which the free exchange of ideas and information is crucial. The law of defamation is largely a creation of the 19th century, and its precepts do not always foster these policies. The law of defamation is, moreover, encumbered by

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[162] Carter-Ruck states, supra, note 4 at 3, "defamation is a large and complex branch of the law and though it has in part been codified, is mainly an evolutionary development. The numerous decisions which form its basis span well over 400 years".

antique and complex rules and procedures.[163]

A second major criticism of the law of defamation is that it is a very technical area of law. As a result, the drafting of the pleadings is critical to the success of a defamation action[164].

2. Difficulties Affecting Plaintiffs

Several difficulties with the law of defamation significantly affect a plaintiff's ability to successfully vindicate his or her reputation. First, a plaintiff will be unlikely to succeed or to obtain significant damages unless his or her reputation, prior to its being injured by the defamation, was very good. As Williams states,

> The vicissitudes of a defamation action are extraordinary. The character of the plaintiff will be examined in the most minute detail. The witnesses must be good, and the character of the plaintiff must be unblemished.[165]

However, in many cases, an accused who is defamed by pre-trial publicity may have a reputation which is somewhat less than spotless. Consequently, such an accused, even though he or she may be significantly defamed by unwarranted, prejudicial media publicity prior to criminal proceedings, will be at worst unsuccessful in a defamation action, and at best will recover only nominal damages against the media.

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[163] Supra, note 52 at 3. Likewise, as Evans puts it, supra, note 47 at 692-693, "defamatory statements can and are published through the use of radio and television. The special nature of these media create special problems in relation to the law of defamation, and yet in many instances, the age old law is applied to the new medium without any critical analysis".

[164] As stated by many commentators and courts: see, for instance, Brown, supra, note 4 at 843; Boys v. Star Ptg. and Pub. Co., supra, note 80; Lougheed v. Canadian Broadcasting Corp., supra, note 29; Paquette v. Cruji (1979), 103 D.L.R. (3d) 141 (Ont. H.C.); Olsen v. St. Martin (1981), 32 A.R. 51 (Q.B.).

[165] "Decorum in Defamation", supra, note 134 at 274.

Second, a defamation action by its very nature breeds further publicity surrounding the plaintiff and the original defamatory statements. This further publicity may thus worsen the damage already done to an accused's reputation, either as a result of the defamation being repeated many times during the proceedings or as a result of further, previously undisclosed information about the accused being brought out during the defamation proceedings. This latter risk is particularly significant where the publicity alleges the accused's general bad character or bad conduct, since a defendant is entitled, in order to prove justification, to bring in evidence establishing such general bad character or conduct. As a result, previously undisclosed information about an accused may be revealed by the media defendant's evidence during the defamation proceedings[166].

Third, defamation proceedings can be very time-consuming and very expensive[167]. This is particularly true where the defendant is a large media organization, for such defendants are not adverse to deliberately dragging out the proceedings in the hope that the plaintiff's usually limited financial resources will be exhausted long before the matter actually goes to trial[168].

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[166] Beckton, The Law and the Media in Canada, supra, note 51 at 49. As Gatley states, supra, note 4 at para. 385, the plaintiff who takes the stand and denies the defamatory comments may "...be cross-examined as to his conduct and credit, and in the result may sustain infinitely more injury than that which he has sustained from the defamatory words themselves".

[167] Beckton, The Law and the Media in Canada, supra, note 51 at 23; R.J. Sharpe, "The Charter and Defamation: Will the Courts Protect the Media?", in P. Anisman & A.M. Linden, eds., The Media, The Courts and the Charter (Toronto: Carswell, 1986)149 at 153.

[168] While this may appear to be a cynical comment about the motivations of media defendants, this situation has arisen in Canadian defamation cases. For instance, in Vogel v. Canadian Broadcasting Corp., supra, note 40, the court criticized the defendants' conduct and stated that the defendants had carried on with the strategy of fighting every step in the hope that the plaintiff would lack the nerve and the financial resources to sustain the action to the end. Unfortunately for the defendants, the plaintiff persevered and ultimately succeeded in the action.

These financial and time considerations will be particularly acute in the case of an accused who is also facing trial on a criminal charge, and who must thus have sufficient financial resources for a criminal trial as well as for a potentially protracted defamation action against the media defendant.

3. Difficulties Affecting Defendants

Several difficulties exist with this area of law which significantly affect a defendant's ability to mount a successful defence in a defamation action. First, the fact that defamation is a strict liability tort and that the defendant's actual intention is usually irrelevant to a finding of liability has been criticized as being unfair to defendants[169]. In the words of one commentator, "it would be preferable if the law of defamation were brought into accord with the law of negligence, and liability imposed only where the speaker and writer acted intentionally or negligently..."[170].

Second, many of the possible defences available to a defendant are seen as placing too heavy an onus on the defendant, particularly where the defendant is a media organization. It has been argued that the defence of justification goes against all the principles and requirements of justice because it places a heavy onus upon a defendant to prove the substantial truth of every statement in the publication[171]. The defence of fair comment has been similarly criticized because of the heavy onus it places on a defendant to establish both the truth of the underlying facts and the fairness of the comment based on those facts[172].

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[169] Williams, The Law of Libel and Slander, supra, note 4 at 3

[170] Brown, supra, note 4 at 34-35.

[171] Skarsgard, supra, note 31 at 302.

[172] Beckton, "Freedom of the Press", supra, note 5 at 132.

Perhaps the most significant objection raised to this area of law, however, at least from the media defendant's point of view, is that defamation law breaches the Charter by infringing on the freedoms of expression and the media guaranteed thereunder. However, this can be countered on the basis that defamation law is not a unreasonable limit on the media[173].

C. PROPOSALS FOR REFORM OF THE LAW OF DEFAMATION

Given the general state of dissatisfaction with the law of defamation, it is not surprising that there are many proposals for reform of this area of law. These have included drastically limiting the scope of defamation[174]; expanding the defence of qualified privilege by recognizing freedom of expression in certain cases as not only a right but also a duty[175] and by restraining the right of public officials to bring a defamation action[176]; expanding the availability of media reply and retraction as alternate remedies available to a plaintiff[177]; removing the presumption of malice[178]; forming "press councils" to deal with moderately serious grievances concerning defamatory statements made by the media[179]; replacing the current strict liability regime with a fault-based system of liability, so that intent would be relevant in determining a defendant's liability[180]; and reforming the law of defamation by way of legislative amendment[181].

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[173] Discussed below.

[174] P.C. Weiler, "Defamation, Enterprise Liability and Freedom of Speech" (1967) 17 U.T.L.J. 278 at 343.

[175] D. Madott, "Libel Law, Fiction and the Charter" (1983) 21 Osgoode Hall L.J. 741 at 786.

[176] M.R. Doody, "Freedom of the Press, the Canadian Charter of Rights and Freedoms, and a New Category of Qualified Privilege" (1983) 61 Can. Bar Rev. 124 at 149.

[177] Weiler, supra, note 174 at 341-341; J.G. Fleming, "Retraction and Reply: Alternative Remedies for Defamation" (1978) 12 U.B.C. L. Rev. 15. Indeed, in the United States, dissatisfaction with the law of defamation in that country has resulted in proposals to implement non-litigation remedies such as arbitration and to eliminate monetary damages as a remedy: see, for instance, M.A. Franklin, "A Declaratory Judgment Alternative to Current Libel Law" (1986) 74 Calif. L. Rev. 809; D.A. Barrett, "Declaratory Judgments for Libel: A Better Alternative" (1986) 74 Calif. L. Rev. 847.

[178] Klar, supra, note 103 at 154.

[179] C. Wright, "Issues of Law and Public Policy", in W. Tarnopolsky et al., Royal Commission on Newspapers, Vol. 3 (Ottawa: Minister of Supply and Services Canada, 1981), 49.

However, not all commentators see the need to completely overhaul the law of defamation. In the words of one commentator ,

> A defamation action, though certainly cumbersome and expensive, may offer the best blend of deterrence and compensation, without unduly inhibiting free speech. That is undoubtedly why the defamation action has survived and will continue to flourish, despite its many obvious shortcomings.[182]

V. CANADIAN CHARTER OF RIGHTS AND FREEDOMS

One of the most significant criticisms that has been made of the law of defamation is that it violates the Canadian Charter by infringing upon the guaranteed freedoms of expression and the media set out in s.2(b) of the Charter. Several commentators have stated that defamation law in general has a "chilling effect" upon the media in that it results in a virtual paralysis of the media, and thus seriously limits the media's freedom of expression[183]. Commentators have also criticized specific aspects of the law of defamation, such as the use of injunctions to prohibit the dissemination of potentially defamatory material, as violating Charter rights[184].

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[180] Skarsgard, supra, note 31 at 290, 316-317; Weiler, supra, note 174 at 317.

[181] For instance, the Uniform Defamation Act, as set out in the Law Reform Commission of British Columbia, supra, note 52, Appendix C, was passed in 1962 and amended in 1979. Defamation Acts in several provinces have been closely modelled on this Act: see, for example, Alberta's Defamation Act. The B.C. Law Reform Commission has created a Draft Defamation Act, supra, note 52, Appendix A. As well, the Ontario government has established an advisory committee to examine Ontario's Libel and Slander Act, supra, note 6, and all aspects of defamation law: Lawyers Weekly (Sept. 8, 1989) 7.

[182] Linden, supra, note 2 at 669.

[183] See, for instance, Beckton, "Freedom of the Press in Canada", supra, note 5 at 130; Sharpe, supra, note 167 at 153.

[184] Beckton, "Freedom of the Press in Canada", supra, note 5 at 135-137.

To date, very few cases have dealt with the Charter's application to the law of defamation. The cases that have considered this issue have held that the law of defamation does not breach the Charter[185]. In Coates v. Citizen[186], the defendant newspaper argued that the provisions of Nova Scotia's defamation legislation breach s.2(b) of the Charter. The court dismissed this argument and stated that the legislation did not restrict publication of the news; did not prevent comment upon perceived government ineptitude; and did not stifle criticism of prominent political figures. The court emphasized that the press enjoys no greater freedom than that enjoyed by the private citizen[187].

It is submitted that this decision is correct and that the law of defamation in general does not violate the Canadian Charter. Although specific aspects of the law of defamation should be reconsidered and may possibly need to be changed[188], the law of defamation as a whole is not an overly-restrictive limitation upon the media, unless, of course, requiring the media to accurately and truthfully report facts is seen as too great a restriction upon it.

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[185] Although in Snyder v. Montreal Gazette Ltd., supra, note 140, Lamer, J., dissenting from the majority decision of the Supreme Court of Canada, stated that he would not allow the damages of $135,000, initially awarded at trial and substantially reduced on appeal to the Quebec Court of Appeal, to be reinstated, on the basis that high damage awards in defamation actions paralyze and endanger the operation of information agencies and that the value placed by the Court on individual reputation cannot be so high as to threaten the existence and functioning of the press agencies which are essential to preserve a right guaranteed by the Charter.

[186] (1988), 85 N.S.R. (2d) 146 (S.C.T.D.).

[187] This issue was also raised in Hill v. Church of Scientology of Toronto (1985), 35 C.C.L.T. 72 (Ont.H.C.), wherein one defendant, which had broadcast statements made by other defendants, argued that since s.2(b) of the Charter now guarantees freedom of expression, Ontario law should follow the American law and require a plaintiff to prove, as part of his or her case, that the defendant was motivated by express malice. The court dismissed this argument on the basis that it should be heard by a trial judge after evidence and full argument, and should not be resolved on an interlocutory basis. In Getty v. Calgary Herald (1990), 104 A.R. 308 (Q.B.), the court held that the tort of defamation is private litigation not involving any element of governmental action or intervention, and that therefore the Charter does not apply.

[188] As in, for instance, the irrelevance of intent in determining a defendant's liability.

Clearly, the law of defamation is aimed at punishing those who are responsible for the making of false statements which damage another's reputation. This is not inconsistent with the guarantee of freedom of expression. Indeed, as one commentator has pointed out, freedom of expression does not and should not include the right to make false statements about individuals[189].

The law of defamation has evolved largely as a response to the perennial dilemma raised by the need to balance competing and conflicting rights and freedoms, such as freedom of expression, the right of an individual to his or her good name and reputation, and, to a lesser extent, the right of an accused to a fair trial before an impartial tribunal. Clearly, the balancing of these interests is a critical part of the law of defamation. In the words of Dickson, J. (as he then was), "the law of defamation must strike a fair balance between the protection of reputation and the protection of free speech..."[190]. That society has chosen to give priority to the protection of reputation when that reputation is threatened by false statements is not an unreasonable limitation upon freedom of expression as set out under the Charter.

VII. DEFAMATORY LIBEL UNDER THE CRIMINAL CODE

While the publication of libel can thus be the subject of civil defamation proceedings, whereby the party injured by the libel seeks remedies such as monetary damages and injunctions, the publication of libel can also be the subject of criminal law proceedings under the Canadian Criminal Code. If found guilty of criminal libel, the party responsible for the libel may be punished by imprisonment for up to five years. Thus, libel is both a tort and a crime[191].

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[189] P. Worthington, "Freedom of the Press: A Response", in P. Anisman & A.M. Linden, eds., The Media, The Courts and the Charter (Toronto: Carswell, 1986) 143 at 147. In a similar vein, Farris, C.J.B.C. stated in Church of Scientology of British Columbia v. Radio N.W. Ltd., supra, note 155 at 460 that "...the right of free speech ends when one falsely makes grossly defamatory remarks...".

[190] As stated in his dissenting judgement in Cherneskey v. Armadale Publishers Ltd., supra, note 10 at 342.

The crime of defamatory libel consists of the publication of matter, without lawful justification or excuse, that is likely to injure the reputation of a person by exposing him to hatred, contempt or ridicule, or that is designed to insult the person of or concerning whom it is published[192]. "Publication" consists of exhibiting a libel in public, causing it to be read or seen, or showing or delivering it with the intent that it should be used or seen by the person whom it defames or by any other person[193] . Publication of a defamatory libel will be punished by imprisonment for up to two years[194] or, where the person who publishes it does so with knowledge of its falsity, for up to five years[195].

The Code sets out several defences to this crime. In particular, the Code provides for defences similar to the defences of innocent dissemination[196]; absolute privilege[197], fair comment[198], justification[199], and qualified privilege[200]. The Code also sets out a defence of publication for the public benefit[201], a defence which is unavailable in relation to the tort of defamation[202].

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[191] For discussion of the historical background and development of this crime, see Law Reform Commission of Canada, Working Paper 35: Defamatory Libel (Ottawa: Minister of Supply and Services Canada, 1984) at 1-7; J. R. Spencer, "Criminal Libel--A Skeleton in the Cupboard (1)", [1977] Crim. Law Rev. 383; "Criminal Libel--A Skeleton in the Cupboard (2)", [1977] Crim. Law Rev. 465. It appears that this offence only covers libel and does not cover slander.

[192] Criminal Code, s.298.

[193] Ibid., s.299.

[194] Ibid., s.301.

[195] Ibid., s.300.

[196] Ibid., s.304.

[197] Ibid., ss.306, 307, 308, 316.

[198] Ibid., s.310.

[199] Ibid., s.311. However, in order to rely on the truth as a defence, an individual charged with defamatory libel must show not only that the matter published was true but also that the publication was for the public benefit.

[200] Ibid., ss.312, 313, 314, 315.

However, while this crime is available to punish those responsible for the publication of defamatory libel[203], it has been used in only a few Canadian cases[204]. The lack of use of this crime is largely due to its complexities[205]; to the fact that the civil remedies of damages and injunctions are a far more suitable means of dealing with the injury done to an individual's reputation[206]; and to the fact that defamatory libel is largely considered to be a private wrong rather than a wrong against the state[207].

There has been some suggestion that the crime of defamatory libel offends the Canadian Charter in that it may violate both s.2(b) and s.11(b)[208] of the Charter. As the court pointed out in Coates v. Citizen[209], one must wonder about the future of this crime in light of Charter provisions guaranteeing an accused the presumption of innocence.

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[201] Ibid., s.309. Other provisions dealing with the crime of defamatory libel include s.297 (definition of "newspaper"); s.303 (liability of a proprietor of a newspaper); s.317 (possible verdicts); s.478(2) (geographical jurisdiction); s. 584 (sufficiency of count charging libel); ss.611 and 612 (pleas of justification); s.637 (standing by of jurors in libel cases); and s.728 (costs to successful party in libel prosecution).

[202] For a comprehensive analysis of the crime of defamatory libel, see Law Reform Commission of Canada, Working Paper 35, supra, note 191.

[203] It should be emphasized that the crime of defamatory libel exists in addition to the common law tort of defamation. Thus, an individual who is sued successfully for the tort of defamation and who is ordered to pay damages may also be charged and convicted of the crime of defamatory libel, and cannot argue res judicata or autrefois convict in respect of these latter criminal proceedings: Menard v. R. (1983), 60 C.C.C. 334 (Que. K.B.).

[204] Cases dealing with the crime of defamatory libel include R. v. Cameron (1898), 2 C.C.C. 173 (Que. Q.B.); R. v. Molleur (No. 1) (1905), 12 C.C.C. 8 (Que. K.B.); R. v. Law (1909), 15 C.C.C. 382 (Man. C.A.); R. v. Fournier (1916), 25 C.C.C. 430 (Que. K.B.); Menard v. R., supra, note 203; R. v. Powell (1938), 69 C.C.C. 205 (Alta. S.C.A.D.); R. v. Unwin, [1938] 1 W.W.R. 339 (Alta. S.C.A.D.); Pratte v. Maher (1963), 43 C.R. 214 (Que. Q.B.); R. v. Georgia Straight Publishing Ltd.. (1969), 4 D.L.R. (3d) 383 (B.C. Co. Ct.); and R. v. Reinke (1972), 7 C.C.C. (2d) 410 (Ont. Co. Ct.).

[205] Law Reform Commission of Canada, supra, note 191 at 54.

[206] Ibid. at 52. Also see L.A. Powe, Jr., "The Georgia Straight and Freedom of Expression in Canada" (1970) 48 Can. Bar Rev. 410 at 429; P.T. Burns, "Defamatory Libel in Canada" (1969) 17 Chitty's L.J. 213 at 214.

[207] Law Reform Commission of Canada, Working Paper 35, supra, note 191 at 49.

[208] See, for instance, Beckton, "Freedom of the Press", supra, note 5 at 130; Law Reform Commission of Canada, ibid. at 33.

[209] Supra, note 186.

VIII. CONCLUSION

The law of defamation exists primarily to protect and vindicate an individual's reputation and to ensure that an individual's reputation is not ruined by false statements. Defamation law thus serves to control, at least to some limited extent, what is published by the media and to impose liability upon the media for false publications about an individual. To this extent, the law of defamation imposes a mild type of censorship upon the media[210].

This limited censorship upon the media is both reasonable and necessary. Given the breadth and range of media disseminations, the potential for damage by defamatory media publications is great. As the Law Reform Commission of British Columbia put it,

> The modern technology of mass communication has greatly increased the exposure that a defamatory statement may receive. National and international dissemination through the print or electronic media can damage reputation with an effectiveness and speed that was unimagined when the fundamentals of the law of defamation were established.[211]

Indeed, the consequences of defamatory media statements can be devastating for the individual so defamed[212], and in many cases the damage done by media defamation can never be fully repaired[213]. In light of these considerations, requiring the media to be accountable for what it falsely publishes seems neither unreasonable nor overly demanding.

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[210] A.D. Levy, "Open Line Radio Programs and the Law" (1969) Can. Communic. L. Rev.160 at 174.

[211] Supra, note 52 at 21.

[212] For instance, in Vogel v. Canadian Broadcasting Corp., supra, note 40, the plaintiff was suspended with pay while investigations were made into the media's allegations, and both the plaintiff and his family were hounded by the media and suffered great stress from the defamatory publications. In Barltrop v. Canadian Broadcasting Corp., supra, note 106, the plaintiff was an English physician of high stature and reputation, at least prior to C.B.C.'s broadcast. Following the defamatory broadcast, he received no new retainers from North America, which greatly reduced his income. Likewise, in Thomas v.

Further, requiring the media to be accountable for its false publications is essential in light of the fact that in many cases, a media organization's publication of false information results from a desire to enhance its own reputation and to increase ratings[214] . In Vogel v. Canadian Broadcasting Corp., for instance, Esson, J., stated, when describing the defamatory publication made by C.B.C., that

> It is an accepted tenet of our democratic society that the press serves the public interest by exposing corruption and misconduct by those in public life, and that it is essential that it perform that role. It is, however, sometimes hard to see that any public interest is served other than the interest in being entertained. In this case, that was the interest intended to be served. The program was conceived and executed as a form of entertainment presented in the guise of news. It succeeded in its purpose of creating a sensation. In the ensuing uproar, factual rebuttal and rational discussion were all but out of the question[215] .

Surely it is not unreasonable to hold the media accountable for false publications which arise from such a desire to increase circulation. Indeed, allowing the media to publish whatever material it chooses under such

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Canadian Broadcasting Corp., supra, note 28, the plaintiff's authority at work was reduced for three years following C.B.C.'s defamatory broadcast.

[213] As Brown states, supra, note 4 at 780, "...if the client [plaintiff] truly seeks a vindication of his reputation, he may find that, no matter how strong the apology and retraction or how liberal the damages, the successful conclusion of litigation can never completely undo the original harm. As Lord Atkin has said: 'It is impossible to track the scandal, to know what quarters the poison may reach'".

[214] This has been found to be the motivation behind defamatory media publications in several Canadian cases. See, for example, Thomas v. Canadian Broadcasting Corp., supra, note 28; Vogel v. Canadian Broadcasting Corp., supra, note 40.

[215] Ibid. at 84.

circumstances would sacrifice reporting objectivity and accuracy ...upon the altar dedicated to sensational news presentation"[216].

It is not only the less reputable media organizations whose motivation behind the making of defamatory publications is the desire to increase ratings and circulation. Some of Canada's most respected media organizations have not only been held liable for defamatory publications on many occasions[217], but have also, on some of those occasions, been found to have acted irresponsibly and with a complete disregard for the lives and reputations of the individual citizens about whom they publish[218]. Here, the need for the law of defamation and for this mild form of censorship upon the media becomes even more compelling, for the damage done by defamatory publications emanating from widely respected media organizations is far greater than that done by publications coming from less reputable and less credible media organizations.

The law of defamation is thus not an intolerable limit upon freedom of expression. Indeed, it can be argued that the law of defamation in fact encourages freedom by promoting responsibility[219]. As long as the media itself is not willing to take responsibility for its publications and ensure that they do not violate the rights and freedoms of others[220], then the law of defamation is necessary to ensure that those other rights and freedoms are protected and guaranteed. In this manner, then, the law of defamation plays a similar role to that played by prior restraints, law of contempt of court, and the procedural safeguards set out in the Code: the protection of the individual person and of his or her rights when those rights are threatened by prejudicial pre-trial publicity.

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[216] Thomas v. Canadian Broadcasting Corp., supra, note 28 at 342-3.

[217] C.B.C., for instance, has been held liable for defamatory publications in many cases. See, for instance, Baxter v. Canadian Broadcasting Corp., supra, note 12; Burnett v. Canadian Broadcasting Corp., (1981), 92 A.P.R. 1 (N.S.S.C.T.D.); Barltrop v. Canadian Broadcasting Corp., supra, note 106; England v. Canadian Broadcasting Corp., supra, note 26; Vogel v. Canadian Broadcasting Corp., supra, note 40; Atkinson v. Canadian Broadcasting Corp., supra, note 16; and Thomas v. Canadian Broadcasting Corp., supra, note 28.

[218] As in, for instance, Thomas v. Canadian Broadcasting Corp., supra, note 28 ; Vogel v. Canadian Broadcasting Corp., supra, note 40.

[219] As Worthington puts it, supra, note 189 at 147, "constraints on freedom of expression do not necessarily threaten freedom but make it more responsible".

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[220] Indeed, as Worthington states, ibid. at 147, "to give the media blanket privilege to report what they want with safety and as a given right is to jeopardize freedom rather than protect it".

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CHAPTER 6

THE AMERICAN EXPERIENCE

I. INTRODUCTION

The preceding four chapters have focused on the means that exist in Canada to protect an accused's rights when those rights, and specifically the right to a fair trial, are threatened by pre-trial publicity. In particular, prior restraints, contempt of court, the procedural safeguards that exist under the Criminal Code, and the law of defamation have been explored and discussed.

Canada is not, of course, the only country that experiences the problems created by pre-trial publicity and its effects upon an accused's rights. Other countries must also deal with the dangers posed by pre-trial publicity, and the means used in these countries to resolve these dangers are both similar to and different from those used in Canada.

This chapter and the following chapter focus on this issue as it exists in two particular countries: the United States and England. While both countries must deal with the problems posed by pre-trial publicity, these countries have chosen to respond to these problems in markedly different ways. The discussion in this chapter concentrates on the American experience; the following chapter concentrates on the English experience.

II. FREE SPEECH AND FAIR TRIAL IN AMERICA: AN OVERVIEW

In the United States, the conflict that exists between freedom of expression and an accused's right to a fair trial arises from the interplay between the 1st and 6th Amendments of the American Constitution[1].

Pursuant to the 1st Amendment,

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Pursuant to the 6th Amendment,

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

As a result, the potential exists that the media's right to be unfettered and free from restriction will come into sharp conflict with an accused's right to a fair trial in situations involving pre-trial publicity.

There is some question in the United States, however, as to whether this potential conflict does in fact exist. Many commentators have questioned the assumption that pre-trial publicity makes a lasting impact upon the public and the jury which thus endangers an accused's right to a fair trial[2]. These commentators have argued that in the vast majority of cases, the conflict created by the interplay of these two Amendments to the Constitution is more potential than real, and that any actual danger to an accused's fair trial can be adequately dealt with by procedural safeguards such as continuances (or adjournments), jury instructions, and changes of venue[3].

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[1] In Canada, the corresponding constitutional rights are set out in ss. 2(b) and 11(d) of the Canadian Charter of Rights and Freedoms.

[2] See, for instance, R. Frasca, "Estimating the Occurrence of Trials Prejudiced by Press Coverage" (1988) 72 Judicature 162; R.L. Goldfarb, The Contempt Power (New York: Columbia University Press, 1963) at 296; L.H. Tribe, American Constitutional Law, 2nd ed. (New York: The Foundation Press, Inc., 1988) at 860; S.A. Hagen, "KUTV v. Wilkinson: Another Episode in the Fair Trial/Free Press Saga" [1985] Utah L. Rev. 739 at 756.

However, other commentators have disagreed and have firmly stated that the impact of pre-trial publicity upon an accused's right to a fair trial is very serious[4], particularly when the pre-trial publicity relates to matters which may not necessarily become evidence admitted at the trial itself, such as an accused's confession and an accused's prior criminal record[5]. Indeed, in light of the wide-ranging power of the media and the sensational media coverage that has attended numerous American trials[6], it seems difficult from a commonsense point of view to argue that pre-trial publicity, particularly when it is pervasive and sensational, has no effect upon potential jurors. As Magruder, C.J., puts it[7],

> One cannot assume that the average juror is so endowed with a sense of detachment, so clear in his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pre-trial publicity.

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[3] For instance, A. Friendly & R.L. Goldfarb point out, in Crime and Publicity: The Impact of News on the Administration of Justice (New York: Twentieth Century Fund, Inc., 1967) at 90, that studies have shown that normal courtroom precautions can undo any damage done by pre-trial press publications.

[4] See, for instance, W.H. Erickson, "Fair Trial and Free Press: The Practical Dilemma" (1976-77) 29 Stan. L. Rev. 485 at 486. As A.M. Linden points out, in "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 299 at 318, several American studies have shown that a prospective juror's belief in an accused's guilt or innocence can be firm, although not unshakeable, once implanted by media coverage, and that the more information a prospective juror is given, the more likely he or she is to prejudge a case. Also see T.P. Goggin & G.M. Hanover, "Fair Trial v. Free Press: The Psychological Effects of Pre-Trial Publicity on the Juror's Ability to be Impartial: A Plea for Reform" (1964-65) 38 So. Cal. L. Rev. 672.

[5] B.C. Schmidt, Jr., "Nebraska Press Association: An Expansion of Freedom and Contraction of Theory" (1976-77) 29 Stan. L. Rev. 431 at 450-451.

[6] Discussed below in more detail in relation to the reversal of convictions on appeal.

[7] Delaney v. United States, 199 F. 2d 107 at 112-113 (1st Cir. 1952).

However, perhaps partly due to this belief that the danger posed by pre-trial publicity is more potential than real, and perhaps partly due to the overwhelming importance historically given in America to freedom of expression, this conflict between fair trial and free speech has been resolved largely in favor of free speech. As a result, the American media has been left free to roam unchecked. The accused's right to a fair trial is protected primarily by measures directed at controlling the conduct of the trial itself, such as changes of venue and voir dires, rather than by measures directed at controlling the conduct of the media. Indeed, measures which are perceived as being aimed at the media's conduct and at limiting media freedom, such as prior restraints, contempt of court proceedings, and defamation proceedings, are sharply circumscribed and are thus of little assistance to an accused who is the subject of pre-trial publicity. As one commentator sums up this American experience:

> ...motivated by the competitive pressures of economic existence, the warped sensationalism of a large section of the press and the constitutional limitations combined with judicial reluctance, the press have obtained a licence of injurious publication and comment which will likely impair a fair trial and yet be beyond reprehension.[8]

In order to understand the American experience, four main topics will be considered[9]. First, sub judice constructive contempt as it exists in the United States will be discussed. Second, the American law of defamation will be considered in relation to the protection of an accused's interest in his or her reputation when that reputation is damaged by pre-trial publicity. Third, the issue of prior restraints upon the American press will be addressed. Finally, the procedural safeguards that exist in the United States to protect an accused's right to a fair trial will be discussed.

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[8] W.J. Freedman, "Fair Trial-Freedom of the Press (1964-65) 3 Osgoode Hall L.J. 52 at 57.

[9] It must be emphasized that this discussion of the American experience is not meant to be an exhaustive analysis of American law, but rather is intended to serve as a general overview for the purposes of comparison with the Canadian experience.

III. CONTEMPT OF COURT

American contempt of court law has undergone substantial change over the last century. While initially it was very similar to English, and thus to Canadian, contempt law, statutory and constitutional limitations on contempt of court have reduced its effectiveness as a control upon the media.

The ability of American courts to punish sub judice constructive contempt, whereby the court punishes those responsible for publications which interfere with the administration of justice in a pending case[10], was initially affected by a problem of interpretation of the early federal contempt statute, which allowed federal courts to punish contempt which occurred either in their presence, "or so near thereto as to obstruct the administration of justice"[11]. Initially, this phrase was interpreted in a geographical context: the court could only punish contempt taking place either in the court itself or in the court's immediate physical vicinity. Thus, federal courts were precluded from punishing most contemptuous out-of-court publications[12], since these publications usually took place far from the court's actual or immediate physical location.

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[10] For a detailed discussion of the different types of contempt and of the basic principles relating to the law of contempt of court, see Chapter 3, "Contempt of Court".

[11] As discussed in Goldfarb, supra, note 2 at 20-25, 188.

[12] The exceptions to this were publications which threatened or which imputed corrupt motives in order to influence a person involved in the administration of justice: J.A. Barist, "The First Amendment and Regulation of Prejudicial Publicity--An Analysis" (1967-68) 36 Fordham L. Rev. 425 at 436-437.

This interpretation changed with the 1918 decision of Toledo Newspaper Co. v. United States[13]. Here, the United States Supreme Court affirmed the constructive contempt conviction of a newspaper which was responsible for publications concerning a pending case. The Court upheld this conviction on the basis that the exercise of the contempt power depends upon the nature of the impugned acts in question rather than on their physical location, and held that contempt proceedings will be available when an act prevents or obstructs the exercise of judicial power. With this decision, the Court thus swung back to the traditional English approach by giving the phrase "so near thereto" a causal context relating to the nature of the acts, rather than a geographical context relating to the location of the acts.

Over the next twenty-three years, the federal courts made liberal use of this contempt power to punish constructive contempt[14]. During this period, as well, state courts continued to take a liberal interpretation of the contempt power[15], since they had never been bound by the federal contempt statute.

The use of the contempt power to punish contemptuous out-of-court publications was abruptly curtailed in 1941, when the Supreme Court returned to the geographical interpretation of the federal contempt statute. In Nye v. United States[16], the Court stated that the "so near thereto" phrase suggested physical proximity rather than relevance, thus overruling the earlier Toledo decision. As a result, the federal courts were once again severely restricted in their ability to punish sub judice constructive contempt.

At the same time, a series of Supreme Court decisions beginning in 1941 further restricted the ability of both the federal and the state courts to punish constructive contempt. In Bridges v. California[17], the Supreme Court for the first time directly recognized the First Amendment constitutional issues raised by the punishment of out-of-court publications[18]. In this case, the Court held that contempt convictions which had arisen from comments published about a pending case and which criticized the judge's decision in that case violated the constitutionally-guaranteed rights of freedom of speech and of the press, and amounted, in effect, to censorship.

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[13] 247 U.S. 402 (1918).

[14] Barist, supra, note 12 at 436-7.

[15] Ibid. at 436.

[16] 313 U.S. 33 (1941).

The Court went on to adopt the "clear and present danger" test set out in the earlier Schenck v. United States decision[19] and applied this test to contempt situations involving publications scandalizing the court . The Court thus held that contempt convictions for such out-of-court publications would only be allowed in cases where the publications were of such a nature that they posed a clear and present danger to the administration of justice.

This rule was reaffirmed and applied in the subsequent Supreme Court decisions of Pennekamp v. Florida[20] and Craig v. Harney[21]. As Mr. Justice Douglas stated in this latter decision, the earlier Nye and Bridges decisions

> ...serve as constant reminders that freedom of speech and of the press should not be impaired through the exercise of that [the contempt] power, unless there is no doubt that the utterances in question are a serious and imminent threat to the

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[17] 314 U.S. 252 (1941).

[18] Goldfarb, supra, note 2 at 188.

[19] 249 U.S. 47 (1919). This case involved the conviction of several people, who had mailed circulars to draftees urging them to refuse induction, for conspiracy to violate provisions of the Espionage Act forbidding anyone to obstruct the draft or to cause or attempt to cause insubordination in the military. The Court introduced the "clear and present danger" doctrine in upholding these convictions. This doctrine provides in essence that government restrictions on speech and press will be upheld where the words are used in circumstances of such a nature that they will bring about the substantive evils that the government has a right to prevent.

[20] 328 U.S. 331 (1946).

[21] 331 U.S. 367 (1947).

administration of justice[22].

While this series of decisions dealt specifically with out-of-court publications criticizing judges, subsequent cases have applied this "clear and present danger" rule specifically to sub judice constructive contempt situations[23]. For instance, in Maryland v. Baltimore Radio Show, Inc.[24], members of the media had been convicted of contempt arising from pre-trial publications relating to an accused charged with murder. These publications had included the accused's criminal record, the fact that he had re-enacted the crime with the police, and the fact that the police had found the knife used by the accused in the murder. The Maryland Court of Appeal stated that the issue under consideration was whether the publication presented such a clear and present danger as to deprive the accused of the right to a fair trial. In this case, the court found that the information published did not create such a clear and present danger, and the convictions were reversed.

As a result of these limitations on contempt of court, the courts' ability to punish sub judice constructive contempt is restricted to situations where a publication poses a very substantial danger or threat to the administration of justice. Use of the contempt power as a means of controlling the press has thus been very sporadic and unsuccessful, and the contempt power has almost never been relied upon as a means of protecting an accused's right to an impartial trial[25].

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[22] Ibid. at 373.

[23] As Barist points out, supra, note 12 at 431, these constitutional cases established a constitutional standard creating almost absolute protection for publications which criticize judges. These cases have since been used by other courts to hold that publications which influence a jury in a criminal trial are similarly protected.

[24] 67 A.2d 497 (Md. C.A. 1949), cert. den. 338 U.S. 912 (1950).

[25] Goldfarb, supra, note 2 at 89; Barist, supra, note 12 at 438.

Indeed, many types of pre-trial publications which would be considered in Canada to be serious sub judice constructive contempt are considered in America to be insufficiently serious so as to meet the "clear and present danger" test and to thus merit punishment[26]. Given the inherently prejudicial nature of many of these publications, such as the pre-trial publication of an accused's prior criminal record, it is difficult to imagine what types of publications American courts would consider sufficiently serious so as to merit punishment.

This judicial reluctance to use the contempt power in general, and the sub judice constructive contempt power in particular, has been justified on several grounds. In particular, it has been argued that the contempt power is dangerously vague and can be abused by the courts; that it can be used to keep important material from being published and from reaching the electorate; that it provides no clear guide for the media since its use depends upon the circumstances in each individual case; and that it prevents the publication of accuseds' arrests and confessions even through such publication may quiet fears and apprehensions in the communities in which the crimes took place[27]. Some commentators have also argued that contempt proceedings are of little direct use to an accused and that the punishment of a contemner is, in reality, a "hollow victory" for an accused[28].

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[26] For instance, in Worcester Telegram & Gazette, Inc. v. Commonwealth, 238 N.E.2d 861 (Mass. 1968) and in Maryland v. Baltimore Radio Show, Inc., supra, note 24, the publication of the accused's criminal record was not seen as sufficiently serious so as to meet the "clear and present danger" test, even though the publication of the record would have clearly amounted to contempt in Canada: see Chapter 3, "Contempt of Court".

[27] D.A. Schmeiser, Civil Liberties in Canada (Toronto: Oxford University Press, 1964) at 231; Friendly & Goldfarb, supra, note 3 at [illegible]0.

[28] R. Goldfarb, "Public Information, Criminal Trials and the Cause Celebre" (1961) 36 N.Y.U. L. Rev. 810 at 827.

While many valid criticisms can indeed be made of the law of contempt, its importance and value as a means of ensuring an accused's right to a fair trial should not be overlooked. Without this restraint, the American media are free to report on what they choose in whatever manner they choose without regard to the rights of those about whom they report[29]. Thus, the media are able to exercise great power without being subject to any corresponding responsibility. Such severe restriction upon the use of the contempt power in general, and the sub judice constructive contempt power in particular, is all too clearly an indication that in the United States, the media's right to exercise its freedom of expression has been given priority over an accused's right to a fair trial.

IV. DEFAMATION

A. INTRODUCTION

American defamation law, as with American contempt of court law, has also undergone substantial changes in this century. Until 1964, American defamation law was similar to Canadian and English defamation law. Thus, many of the difficulties that existed with the law of defamation as a means of protecting an accused whose reputation was damaged by pre-trial publicity applied in the United States as well as in Canada[30].

Since 1964, American defamation law has undergone constitutional changes in much the same way as American contempt of court law underwent constitutional changes in the 1940's. As a result, it is now even more difficult for an accused who has been defamed by pre-trial publicity to be compensated for the injury to his or her reputation. Thus, the law of defamation as it exists today is of very little help to an accused in the United States whose reputation has been harmed by prejudicial pre-trial publicity.

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[29] Examples of situations where the press's unlimited freedom in reporting of sub judice legal proceedings has resulted in "trial by newspaper" are set out below in relation to the reversal of convictions on appeal.

[30] For a discussion of these difficulties affecting plaintiffs whose reputations have been damaged, see Chapter 5, "Defamation".

B. THE AMERICAN LAW OF DEFAMATION PRIOR TO 1964

Prior to 1964, the law of defamation in the United States tended to follow traditional English, and thus Canadian, defamation law[31]. As a result, the law of defamation in America was governed by the same common law rules and defences that existed in Canada and England.

However, because jurisdiction over defamation law was left to each individual American state in much the same way as it was left to each Canadian province, these rules and defences of defamation law varied somewhat from state to state. In the words of one commentator, the English common law of defamation "...was transplanted into the United States, where its complexities multiplied in the state legislatures and courts, and its inconsistencies grew multifoliate in the variety of soils provided by federalism"[32]. Further, the law of defamation in the United States was applied differently in the individual states depending upon the nature of the media in question: the electronic media were governed by a different set of rules than were the print media[33].

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[31] M.A. Franklin, "An Introduction to American Press Law", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 63 at 78.

[32] J.D. Eaton, "The American Law of Defamation through Gertz v. Robert Welch, Inc. and Beyond: An Analytical Primer" (1975) 61 Va. L. Rev. 1349 at 1350.

[33] C.O. Lawhorne, The Supreme Court and Libel (Carbondale: Southern Illinois University Press, 1981) at 25.

Regardless of the variations imposed upon defamation law by individual states, however, defamatory speech in general was considered not to be the type of speech that the First Amendment was designed to protect, and was thus not covered by the American Constitution[34]. To put it another way, prior to 1964, defamation law was considered not to infringe the guarantee of free speech set out under the First Amendment.

C. CONSTITUTIONAL CHANGES TO THE AMERICAN LAW OF DEFAMATION

In 1964, the law of defamation began to undergo significant changes with the decision of New York Times Co. v. Sullivan[35], which for the first time extended the First Amendment's protection to defamation law[36], and with a series of subsequent cases that modified and expanded the constitutional First Amendment protection given by Sullivan to defamatory speech. The significance of these cases is summed up by Eaton in the following words:

> In 1964 the Supreme Court invaded the forest [common-law defamation] for the first time and began a decade-long extermination of those ancient and gnarled trees which most seriously threatened first amendment guarantees. In its initial foray the Court insulated critics of government and its officials from the fear of defamation suits. The Court's search and destroy efforts continued in the years that followed, and in 1971 a divided and uncertain Court denuded the forest of most of its leaves. In 1974 the Court halted the defoliation but as an alternative tactic it took a bulldozer to the forest, plowing under major areas of the American common law of defamation.[37]

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[34] E.G. Hudon, "The Supreme Court of the United States and the Law of Libel: A Review of Decided Cases" (1979) 20 C. de D. 833 at 834. See also Beauharnais v. Illinois, 343 U.S. 250 (1952); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

[35] 376 U.S. 254 (1964) (hereafter referred to as Sullivan).

[36] T.L. Tedford, Freedom of Speech in the United States (New York: Random House, Inc., 1985) at 118.

[37] Supra, note 32 at 1350-1351.

In Sullivan, the Supreme Court created a privilege, based on the First Amendment's protection of free speech, which protects those who publish comments about public officials. This constitutional privilege

> prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'--that is, with knowledge that it was false or with reckless disregard of whether it was false or not[38].

The significance of this constitutional privilege is twofold. First, it reverses the common-law presumption of a defendant's malice by requiring that a public official plaintiff establish malice. Second, it redefines "actual malice". The malice the plaintiff must establish is of a higher level than the common law malice traditionally required of a plaintiff trying to defeat a defendant's privilege[39], for the plaintiff must now prove, with "convincing clarity", that the defendant made the defamatory statement with either knowledge of or with reckless disregard as to the statement's falsity. A defendant's mere negligence is insufficient to establish this "actual malice".

The practical effect of the constitutional privilege set out in Sullivan was to give those who made defamatory statements about public officials a near-immunity from defamation judgements[40]. This immunity was further refined and expanded in subsequent cases.

In Garrison v. Louisiana[41] , for instance, the Court held that this constitutional privilege applies to the law of criminal libel as well to the law of defamation, and state courts have subsequently struck down many criminal libel laws which do not comply with this privilege[42]. In Rosenblatt v. Baer[43], the Court broadened the meaning of "public official" by holding that a "public official" includes not only elected officials but also government employees believed by the public to have a substantial responsibility for government affairs. In Curtis Publishing Co. v. Butts[44], the court extended the rule to include public figures who are not public officials, so that public figures as well as public officials must now comply with the "actual malice" standard in order to recover damages for defamation.

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[38] Sullivan, supra, note 35 at 279-280. In Sullivan, an elected official in Alabama alleged he had been libeled by an advertisement placed in the newspaper. The official won at trial and on appeal. The Supreme Court reversed this decision and remanded the case to the trial court on the basis that the plaintiff had failed to establish actual malice.

[39] As Eaton points out, supra, note 32 at 1370, this common-law malice meant simply ill-will or spite.

[40] Ibid. at 1373-1374.

[41] 379 U.S. 64 (1964).

The high-water mark of this constitutional privilege came in Rosenbloom v. Metromedia[45], where the Court extended the "actual malice" standard still further to include private individuals defamed by the media about their involvement in an event of public or general interest. Private individuals who are so defamed must thus, along with public figures and public officials, establish that the media defendant published the defamation with either knowledge of or reckless disregard as to its falsity. Clearly, the implications of this decision are both far-reaching and troubling, for almost everything published by the media can be considered to be of public or general concern[46]. Taken to its extreme, this decision allows any publication about an event which is deemed "newsworthy" by the media to be protected by the constitutional privilege.

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[42] In Weston v. Arkansas, 528 S.W.2d 412 (Ark. S.C. 1975), for instance, the court struck down Arkansas's criminal libel law on the basis, inter alia, that it did not set out this privilege for criticism of a public official. See also Commonwealth v. Armao, 286 A.2d 626 (Pa. S.C. 1972); Eberle v. Municipal Court, 127 Cal. Rptr. 594 (Cal. Ct. App. 1976).

[43] 383 U.S. 75 (1966).

[44] 388 U.S. 130 (1967). The plaintiff was the athletic director at the University of Georgia. He brought a defamation action against the defendant's magazine based on the magazine's allegations that he had "fixed" a football game played against another university.

[45] 403 U.S. 29 (1971).

[46] Lawhorne, supra, note 33 at 79-80;

In 1974, the Supreme Court retreated from this high-water mark. In Gertz v. Welch[47], the Court made three important holdings. First, it held that the constitutional privilege does not extend to the defamation of private individuals. Second, it held that individual States may define for themselves the appropriate standard of liability regarding the defamation of private persons, as long as they do not impose strict liability upon the defendant[48]. Finally, the Court held that presumed and punitive damages can only be recovered if the plaintiff establishes the defendant's "actual malice".

The Court also set out three types of public figures: "truly involuntary" public figures; "all-purpose public figures", or persons who are prominent in societal affairs or who occupy positions of such pervasive power and influence that they are deemed to be public figures for all purposes; and "limited purpose public figures", or persons who push themselves to the forefront of a particular public controversy in order to influence the resolution of the controversy[49] .

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[47] 418 U.S. 323 (1974). In this case, a lawyer who represented a murder victim's family in civil litigation against the policeman convicted of the murder was inaccurately portrayed in the defendant's magazine article as an architect of the "frame-up" of the convicted officer. The article also implied that he had a criminal record.

[48] For instance, in Michigan, the plaintiff must simply prove that the defendant was negligent in order to establish a defamation claim: Rouch v. Enquirer & News of Battle Creek, 357 N.W.2d 794 (Mich. Ct. App. 1984). By contrast, Indiana has incorporated the actual malice standard for private individuals involved in matters of public interest and concern, so that a private person who is defamed in such circumstances must show that the defendant published the defamation with either knowledge of or reckless disregard as to its falsity: Cochrane v. Indianapolis Newspapers, Inc., 372 N.E.2d 1211 (Ind. Ct. App. 1978). Most states have, however, adopted a negligence standard in relation to private individuals and media defamation: R.E. Brown, The Law of Defamation in Canada, Vol. 2 (Toronto: The Carswell Company Limited, 1987) at 1167-1174.

[49] This last category of public figure was further refined to some extent in Time, Inc. v. Firestone, 424 U.S. 448 (1976), where the Court held that "public controversy" does not

This decision thus made a number of significant changes to defamation law. It eliminated the traditional concept of strict liability, so that all plaintiffs, whether private or public individuals, must prove some standard of fault on the defendant's part in order to recover compensation, although the standard required may vary depending on whether the plaintiff is a private individual or a public figure. The decision also altered defamation law relating to damages by requiring a plaintiff to prove the defendant's "actual malice" in order to recover presumed and punitive damages[50].

The most recent significant constitutional changes to defamation law came in the 1986 Supreme Court case of Philadelphia Newspapers Inc. v. Hepps[51]. Here, the Court held that a plaintiff must prove the defamation's falsity in order to succeed against a media defendant. Prior to this decision, the law had traditionally presumed the falsity of defamation, with the defendant being required to prove its truth as a defence to the action. In arriving at this decision, the Court stated that this traditional onus on a media defendant to prove the defamation's truth has a "chilling effect" upon free speech which is antithetical to the First Amendment's protection of true speech on matters of public concern.

In conclusion, the American law of defamation has undergone significant changes in the past thirty years. These changes have come about largely as a result of the Supreme Court's concern for the First Amendment

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include all controversies of interest to the public and that a "cause celebre" is not necessarily a public controversy.

[50] It should be noted that the law relating to damages was further refined in Dun & Bradstreet, Inc. v. Greenmosss Builders, Inc., 72 U.S. 749 (1985), which involved a defamation action between two non-media parties: a credit reporting agency and a construction contractor. Here, the Supreme Court stated that speech on matters of purely private concern is of little First Amendment concern. The Court held that presumed and punitive damages can be awarded in the absence of a showing of actual malice where the defamatory speech is not of public concern.

[51] 106 S. Ct. 1558 (1986).

and for the protection it gives to freedom of speech. The only area of traditional defamation law that has remained relatively untouched is the area of purely private speech, where both the plaintiff and the defendant are private, non-media individuals[52].

D. DEFAMATION AND PRE-TRIAL PUBLICITY AFFECTING AN ACCUSED

In relation to defamatory pre-trial publicity in particular, these changes to the American law of defamation have, for four reasons, made it more difficult for an accused whose reputation has been injured by defamatory pre-trial publicity to obtain compensation for that injury.

1. Lack of Recovery for Defamatory Opinions

First, an accused whose reputation has been injured by pre-trial publicity will not be able to obtain compensation for defamatory opinions, as opposed to facts, which are published about him: American law is clear that there is no such thing as a defamatory idea or opinion[53]. While allegations of specific criminal conduct will not generally be protected as opinion, broad references to an accused's unethical conduct using terms normally understood to impute specific criminal acts may in fact be considered to be opinion, and the accused will be unable to recover damages for those broad references[54].

2. Proof of Falsity

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[52] Eaton, supra, note 32 at 1449.

[53] Gertz v. Welch, supra, note 47.

[54] Lauderback v. American Broadcasting Companies, 741 F.2d 193 (8th Cir. 1984).

Second, an accused whose reputation is injured by pre-trial publicity will have to establish that the publicity is false. This is, again, a change from the common law, where falsity was presumed and the burden rested upon the media defendant to establish truth through the defence of justification.

3. Public Figure/Private Individual Distinction and Actual Malice

Third, the accused's ability to recover compensation for the defamation will be largely affected by whether the accused is considered to be a public figure or a private individual. If the accused is a public figure, he or she must prove the media defendant's "actual malice". If the accused is a private individual, the standard of proof required of the accused may be something less than actual malice, such as negligence, depending upon the particular state in which the action takes place[55]. The accused will, however, be required to establish some level of fault on the part of the media defendant.

Not all individuals who commit a criminal offence become public figures solely by virtue of having committed that offence[56]. Indeed, as the Supreme Court has stated, "to hold otherwise would create an 'open season' for all who sought to defame persons convicted of a crime"[57]. Instead, whether an accused is a public figure or a private individual depends on the particular facts in each case, such as whether the accused's conduct in the community was a legitimate matter of public interest; whether the accused's conduct was publicized by the press as a result of his or her own efforts to obtain publicity; whether the accused's conduct made him or her the target of a criminal proceeding about which the public needs information; and the nature of the accused's participation in the particular controversy or event giving rise to the defamation[58].

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[55] As was discussed above.

[56] Brown, supra, note 48 at 1124.

[57] As per Mr. Justice Rehnquist in Wolston v. Reader's Digest Ass'n., 443 U.S. 157 at 169 (1979). Likewise, in Binder v. City of Seattle, 664 P.2d 492 (Wash. S.C.1983), the court pointed out that a person is not considered to be a "public figure" solely because he or she is a criminal defendant, has sought relief through the courts, or is involved in a newsworthy controversy.

For instance, in Tripoli v. Boston Herald-Traveler Corp.[59], the plaintiff was a suspect in a $1,500,000 mail robbery. The case received national attention, and the plaintiff granted interviews with the media and called press conferences in conjunction with other suspects. In these circumstances, the plaintiff was held to be a public figure. He was thus required to show actual malice on the part of the defendant.

Likewise, in Marcone v. Penthouse International Magazine for Men[60], the plaintiff attorney, who was charged with drug trafficking, had gained notoriety through his personal and professional association with a motorcycle gang. Although the charges were later dropped, the defendant magazine published an article stating that he was guilty of the offence and that the charges had been dropped because he had co-operated with the police. The court held that the plaintiff was a "limited purpose" public figure: his voluntary connection with the motorcycle gang in conjunction with the intense media attention he engendered made him a public figure for the limited purpose of his connection with drug trafficking. The plaintiff was thus required to prove the defendant's actual malice[61].

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[58] Orr v. Argus-Press Co., 586 F.2d 1108 (6th Cir. 1978); Whitten v. Commercial Dispatch Publishing Co., 487 So.2d 843 (Miss. S.C. 1986).

[59] 268 N.E.2d 350 (Mass. S.C. 1971).

[60] 754 F.2d 1072 (3d Cir. 1985).

[61] See also DeSalvo v. Twentieth Century-Fox Film Corp., 300 F. Supp. 742 (D. Mass. 1969), where the plaintiff, who was suspected of being the "Boston Strangler", was found to be a public figure because of the exceptional public interest in the case and the extensive publicity surrounding the plaintiff both before and during his trial; Bell v. Associated Press, 584 F. Supp. 128 (D.C. 1984), where the plaintiff, a well-known football player who was reported as being sought on a bench warrant for lewdness at a casino hall, was

The defendant's actual malice can be established by clear and convincing proof that the defendant had doubts as to the publication's truth; that the story was fabricated; that the story was based wholly on an anonymous phone call; that the story was so inherently improbable that only a reckless person would have put it in circulation; or that there were obvious reasons for the defendant to doubt the story's truth and accuracy[62]. Actual malice is not established by determining whether a reasonably prudent person would have published or would have investigated before publishing[63]. Clearly, requiring an accused whose reputation has been damaged by pre-trial publicity to establish this actual malice imposes a heavy burden upon the accused.

4. Libel-Proof Plaintiffs

Finally, some plaintiffs who are the subject of defamatory pre-trial publicity may be considered to be "libel-proof", and will thus be prevented from bringing defamation actions. This occurs where a plaintiff's reputation is already so poor, such as where the plaintiff is a "habitual criminal", that the defamation is seen as having no effect upon it. It is thus considered unfair to the defendant to allow the plaintiff to sue the defendant when all that the plaintiff could recover are nominal damages.

For instance, in Jackson v. Longcope[64], the court held that the plaintiff's considerable criminal record barred him from recovering damages for

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found to be a public figure for the limited purpose of these allegations, since he was a professional athlete who had long been in the public eye and since criminal misconduct charges relating to professional athletes are the subject of public controversy; Ocala Star-Banner Co. v. Damron, 401 U.S. 295 (1971), where the Court stated that a charge of criminal conduct against an official or candidate, no matter how remote in time or place, is always relevant to fitness for office and is thus covered by the constitutional privilege.

[62] St. Amant v. Thompson, 390 U.S. 727 (1968). See also Lawhorne, supra, note 33 at 61. For a detailed discussion of "actual malice", see Brown, supra, note 48 at 1141-1161.

[63] St. Amant v. Thompson, ibid; Lawhorne, ibid. at 70; Brown, ibid. at 1148-1149.

[64] 476 N.E.2d 617 (Mass. S.C. 1985).

defamatory statements about his record. In arriving at this decision, the court emphasized that courts have considered First Amendment claims to predominate in cases of this nature and have denied such a "libel-proof" plaintiff the right to try and prove his or her case where he or she would only recover nominal damages if successful[65].

E. CONCLUSION

In conclusion, the American law of defamation has undergone significant constitutional changes. In particular, changes in the law have created a constitutional privilege whereby a public figure plaintiff must establish the defendant's actual malice; have required the plaintiff to prove the falsity of a defamatory statement; have required the plaintiff to prove the defendant's actual malice in order to obtain punitive damages; and have eliminated the traditional presumption of fault, so that all plaintiffs must now prove some minimum standard of fault on the part of the defendant. These changes have made it more difficult for an accused whose reputation has been injured by defamatory pre-trial publicity to receive compensation for that injury[66] . As well, accused who are judged to be "libel-proof" because of their poor reputations may be without remedy and may thus be subjected to intense pre-trial publicity without any protection from the law of defamation.

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[65] See also Cofield v. Advertiser Co., 486 So. 2d 434 (Ala. S.C. 1986); Cardello v. Doubleday & Co., 518 F.2d 638 (2d Cir. 1975).

[66] As M. Garbus and R. Kurnit point out in "The Year in Libel", in J.D. Viera et al., eds., 1988 Entertainment, Publishing and the Arts Handbook (New York: Clark Boardman Company, Ltd., 1988) 91 at 102, the press wins 90% of the time. Likewise, R.P. Bezanson, G. Cranberg & J. Soloski state, in Libel Law and the Press: Myth and Reality (New York: The Free Press, a Division of Macmillan, Inc., 1987) at 143, that while the success rate for plaintiffs is high at trial, there is a high rate of reversal on appeal.

The difficulties that accuseds face as a result of these constitutional changes to defamation law[67] are further exacerbated by the traditional difficulties that have existed with defamation proceedings. Indeed, an accused in the United States who seeks compensation for injuries caused by defamatory pre-trial publicity faces many of the same general difficulties that are encountered by plaintiffs in Canada and in England. For instance, defamation actions in the United States are very expensive and time-consuming[68]. In addition, defamation proceedings in themselves generate further publicity surrounding the accused and the original defamation, and this may worsen the damage already done to the accused's reputation.

V. PRIOR RESTRAINTS

The use of prior restraints to control what the media may publish prior to an accused's trial has been long accepted in Canada as an important way of protecting an accused's right to a fair trial. In the United States, however, the use of such prior restraints, or "gag orders", has become an important constitutional issue. As one commentator puts it, "...within recent years the subject of judge-issued gag orders intended to keep prejudicial information from potential jurors has developed into a significant First Amendment debate..."[69].

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[67] Indeed, the difficulties facing plaintiffs in the United States are causing them to bring their actions against U.S. media which distributes or broadcasts internationally in other countries where the libel laws are more favourable to plaintiffs, such as in England and Canada: American Bar Association Journal (Sept. 1989) 38.

[68] Garbus & Kurnit, ibid. at 101. These time and cost considerations are of particular importance to a plaintiff who is also facing trial on a criminal charge and who must thus have adequate financial resources for both the civil and the criminal litigation.

[69] Tedford, supra, note 36 at 344.

The use of prior restraints in general was dealt with in the landmark case of Near v. Minnesota[70]. In this case, a state law provided that a publisher could be enjoined from making a malicious, scandalous or defamatory publication and that malice could be inferred from the fact of such publication. The Supreme Court found this law to be unconstitutional, since it amounted in substance to censorship of speech, and stated that the chief purpose of the constitutional protection of free speech is to prevent prior restraints on publication. The Supreme Court in this case thus formulated the doctrine of prior restraint, which holds that prior restraints are an especially disfavoured form of speech suppression, and which has become the cornerstone of First Amendment theory[71].

Courts subsequently considering this issue of prior restraint have held, on the basis of Near, that prior restraints on expression come to the courts with a heavy presumption against their constitutional validity and that those who defend the restraints carry a heavy burden of showing justification for the imposition of such restraints[72]. This presumption against the constitutional validity of prior restraints is largely based on the fact that prior restraints in the United States are historically associated with censorship, which is viewed as "chilling" free speech[73].

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[70] 283 U.S. 697 (1931) (hereafter referred to as Near).

[71] C.D. Stopek, "Gag Orders: Enhancing Fair Trials or Impeding a Free Press?" (1984) 26 Ariz. L. Rev. 933 at 934-935; S. Cooperstein, "Television Docudramas: Is the Titillation Worth the Risk?" (1989) 20 Rutgers L.J. 461 at 465.

[72] See, for instance, Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); New York Times Co. v. United States, 403 U.S. 713 (1971); C.B.S., Inc. v. Young, 522 F.2d 234 (6th Cir. 1975), cert. den. 427 U.S. 912 (1976); United States v. Dickinson, 465 F.2d 496 (5th Cir. 1972), aff'd 476 F.2d 373 (5th Cir., 1973), cert. den. 414 U.S. 997 (1973); United States v. McKenzie, 697 F.2d 1225 (5th Cir. 1983).

[73] Franklin, supra, note 31 at 73. See also J.M. Shellow, "The Voice of the Grass: Erwin Charles Simants' Efforts to Secure a Fair Trial" (1976-77) 29 Stan. L. Rev. 477 at 478.

The use of prior restraints as a specific trial tactic aimed at ensuring an accused's right to a fair trial was first raised in 1972, but was unsuccessful[74]. In 1975, this issue reached the Supreme Court in Nebraska Press Association v. Stuart[75]. In this case, a Nebraska state judge, in anticipation of a pending multiple murder trial which had attracted widespread publicity, made an order restraining the media from publishing or broadcasting accounts of the accused's confessions or admissions made to the police, as well as other facts "strongly implicative" of the accused. The Supreme Court struck down this order on the ground that it violated the constitutional guarantee of freedom of the press. As Chief Justice Burger stated, when examining the preceding cases on prior restraint, "the thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"[76].

The Supreme Court did not, however, hold that all prior restraints are automatically unconstitutional. Instead, the Court set out a three-part test to be used in determining the constitutional validity of a prior restraint in the context of an accused's right to a fair trial[77] . In assessing the validity of a prior restraint in any particular case, it must thus be determined (1) whether the nature and extent of the pretrial media coverage is such that it poses a clear and present danger to the accused's fair trial; (2) whether other measures, such as a change of venue or sequestration, would mitigate the effects of the pre-trial publicity; and (3) how effectively the restraint would operate to prevent this danger to the accused's fair trial. If the prior restraint meets all three tests, in that the publicity it seeks to suppress poses a clear and present danger to the accused's fair trial; other measures would be ineffective to deal with the effects of the publicity; and the restraint would effectively prevent this clear and present danger to the accused's fair trial, the prior restraint will be allowed to stand.

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[74] Tedford, supra, note 36 at 346.

[75] 427 U.S. 539 (1975) (hereafter referred to as Nebraska Press Association).

[76] Ibid. at 559.

[77] Ibid. at 562.

However, although a prior restraint can still be used if it meets this threefold test, the practical impact of this test is to outlaw almost all prior restraints in the fair trial context[78]. Indeed, Nebraska Press Association has been seen as a significant victory for the media, since it erects an almost insurmountable barrier against the use of prior restraints as a means of guaranteeing an accused's fair trial[79]. Given that the Supreme Court in Nebraska Press Association refused to restrain the highly prejudicial publication of the accused's confessions and admissions[80], it is difficult to imagine what kind of information would be considered by an American court to be so prejudicial as to warrant restraint of its publication. It thus appears that only in the most exceptional of circumstances will the court find a prior restraint to be constitutional .

For instance, in C.B.S. v. U.S. Dist. Ct.[81], the District Court made an order temporarily restraining C.B.S. from broadcasting government surveillance tapes generated in the investigation of the DeLorean case. The Court of Appeals for the Ninth Circuit vacated this order on the basis that it violated the First Amendment rights of C.B.S. The court emphasized that the standard set in Nebraska Press Association is "extraordinarily exacting"; that voluminous pre-trial publicity does not necessarily lead to an unfair trial; and that the traditional procedural safeguards are powerful tools which should be adequate to defuse prejudicial pre-trial publicity. The court went on to state that prior restraints should be allowed in only the most extraordinary circumstances[82].

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[78] J.C. Goodale, "The Press Ungagged: the Practical Effect on Gag Order Litigation of Nebraska Press Association v. Stuart" (1976-77) 29 Stan. L. Rev. 497 at 498. Indeed, as M.D. Lepofsky points out in Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (Toronto: Butterworth & Co. (Canada) Ltd., 1985) at 153, the United States Supreme Court has in essence..."laid down a firm command that prior restraints on speech are virtually never to be tolerated under the First Amendment".

[79] M.J. Zavatsky, "Rights in Collision: Deciding Cases in the Free Press/Fair Trial Debate" (1980) 49 U. Cinn. L. Rev. 440 at 442-443.

[80] This information has been described as the "paradigm" of prejudicial information that could reach potential jurors: Goodale, supra, note 78 at 503.

[81] 729 F.2d 1174 (9th Cir. 1983). In this case, the accused had been charged with conspiracy to import cocaine.

In some cases, however, the courts have allowed prior restraints to stand. In KUTV, Inc. v. Wilkinson[83], the trial judge made an order restraining the media from disseminating information about an accused's organized crime connections until the jurors retired to deliberate. The media unsuccessfully challenged this order, the Utah Supreme Court holding that this prior restraint had met the three-part test. It is significant, however, that this case dealt with publicity during trial rather than before trial, and the court emphasized that the effects of pre-trial publicity can be gauged and counteracted at the time of jury selection.

Prior restraints have also been upheld in situations where the order does not restrain the press itself from publishing information about an accused and his or her pending trial, but rather restrains the trial participants from communicating with the press. For instance, in Re Russell[84], the trial judge made an order prohibiting potential witnesses from discussing their proposed trial testimony with the media. The Court of Appeals for the Fourth Circuit upheld the order on the basis that tremendous publicity had been generated by the case; that the witnesses might make potentially inflammatory and highly prejudicial statements; and that the procedural alternatives were relatively ineffective to ensure the accused's fair trial. Likewise, in KPNX Broadcasting Co. v. Superior Ct.[85], the Arizona Supreme Court upheld a trial judge's order which prohibited trial participants from contacting the media during the trial and which appointed a Court Media Liaison to handle media inquiries for information about the trial and to provide one unified source of information about the proceedings[86].

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[82] See also United States v. McKenzie, supra, note 72, where the court granted a stay of an order restraining a television station from broadcasting a news program which related to a currently pending criminal case. Likewise, the Court of Appeals for the Eleventh Circuit recently upheld an injunction intended to prevent the news network C.N.N. from broadcasting tapes it had obtained of conversations between Manuel Noriega, the deposed Panamanian leader, and his lawyer. These conversations had been recorded by the federal government, and broadcast of the tapes would clearly have posed a great risk to the impartiality and fairness of Noriega's trial on drug trafficking charges. However, C.N.N. did in fact broadcast these tapes in violation of this prior restraint: as discussed in Calgary Herald (9 November 1990) A3; (11 November 1990) A8; (13 November 1990) A9; (18 November 1990) A10.

[83] 686 P.2d 456 (Utah S.C. 1984).

This type of prior restraint aimed at the trial participants amounts to an indirect prior restraint on the media: the media is, in effect, restrained from publication because its access to its sources has been curtailed by restraint orders aimed at the trial participants. Indeed, this was the conclusion reached in C.B.S., Inc., v. Young[87], where the court, in striking down an order made by the trial judge restraining all parties from discussing a case with the media, stated that this type of prior restraint effectively removes significant and meaningful sources of information from the media[88].

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[84] 726 F.2d 1007 (4th Cir. 1984), cert. den. 469 U.S. 837 (1984).

[85] 678 P.2d 431 (Ariz. S.C. 1984). See also Levine v. U.S. Dist. Ct., 764 F.2d 590 (9th Cir. 1985), where the district court granted a restraining order prohibiting the lawyer from speaking with the media about the pending case's merits. The Court of Appeals for the Ninth Circuit granted an order of mandamus compelling the district court to dissolve the order on the basis that it was overbroad. However, the Court of Appeals stated that the district court could define the scope of the order more narrowly, as in, for instance, proscribing statements relating to specified subjects. Such an order would then be appropriate.

[86] But see Re Oliver, 452 F.2d 111 (7th Cir. 1971), where the district court adopted a policy containing blanket prohibitions on all extrajudicial comment by counsel in all pending cases. The Court of Appeals for the Seventh Circuit struck down this policy because it violated the First Amendment, and stated that the limitation of First Amendment rights requires a finding of a serious and imminent threat to the administration of justice. The court found that such a blanket prohibition would make a mockery of the free speech guaranteed by the First Amendment.

[87] Supra, note 72.

In conclusion, the use of prior restraints to limit the publication of pre-trial publicity has been sharply curtailed in the United States. In some cases, it may be possible to restrain trial participants from communicating with the media, and in that way to indirectly restrain the media from publication. However, prior restraints in general have a heavy presumption against their constitutional validity, must meet the three-fold test set out in Nebraska Press Association, and must be narrowly drawn. Indeed, in most cases, prior restraints against the media will be struck down on the basis that they infringe the First Amendment's constitutional guarantees.

It is difficult to see why prior restraints, particularly when they are temporary, should be viewed as being completely unacceptable. As some commentators have pointed out, a temporary delay in the publication of particular items, such as an accused's confession or prior criminal record and editorial comments concerning an accused's guilt, does not necessarily thwart the public interest and does not forever stop the publication[89]. Indeed, given that the temporary delay of publication may prevent the pre-trial release of information which is extremely damaging to an accused's fair trial, such as the accused's criminal record or the accused's confession, it seems difficult to argue that these restraints are unacceptable[90].

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[88] It should be noted that the issue of prior restraint also relates to the wider issue of media access. It is clear that the media cannot be denied access to criminal trials. In Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980), the Supreme Court reversed the trial court's closure of the accused's murder trial to the public on the basis that the right to attend criminal trials is implicit in the First Amendment's guarantees and that to hold otherwise eviscerates important aspects of freedom of speech and the press. The media can, however, be excluded from pre-trial hearings and preliminary motions: Gannett Co. v. DePasquale, 443 U.S. 368 (1979), where the Court upheld the press's exclusion from a pre-trial hearing on a motion to suppress allegedly involuntary confessions and certain physical evidence.

[89] See, for instance, B.S. Meyer, "Free Press v. Fair Trial: The Judge's View" (1964-65) 41 N.D.L. Rev. 14 at 19-20. Also see the discussion in Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests, and Preliminary Inquiries".

In the United States, however, the overwhelming importance given to freedom of the press and the reliance of the courts upon the traditional safeguards as being adequate measures to protect the fairness of an accused's trial[91] have made it possible to justify such publication at the expense of an accused's right to an impartial jury.

VI. PROCEDURAL SAFEGUARDS

A. INTRODUCTION

In the United States, as in Canada[92], procedural safeguards such as change of venue, continuance, and sequestration have been heavily relied upon by the courts as being adequate and appropriate means of dealing with the problems created by pre-trial publicity and of ensuring the accused's right to an impartial jury. In the words of two commentators,

> For the most part, the law has dealt with the free press, fair trial problem by devising...a maze of filtering procedures calculated to keep the stream of justice pure, as it flows into courts and before juries, of the corruptions of press

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[90] Of course, temporary delays in publication may affect the news value of the publication, and this is of concern to the media. Indeed, the media has reacted very strongly against suggestions that publication should be postponed, even if only for a short time. As Friendly & Goldfarb describe media reaction to prior restraints, "the standard response of the owner or publisher is a knee-jerk reflex exalting the noble purpose of the news craft": supra, note 3 at 35. Whether this media reaction truly arises from concern for a perceived restriction on freedom of speech or whether it arises more out of concern for lost profits is open to debate.

[91] As is discussed below in relation to the procedural safeguards used in the United States.

[92] For a discussion of the procedural safeguards that exist in Canada, see Chapter 4, "Procedural Safeguards".

publication[93].

Indeed, American courts have relied on the availability of these safeguards to justify curtailing the use of both contempt of court proceedings and prior restraints as ways of protecting the accused's Sixth Amendment rights.

These safeguards can be divided into three broad categories: reversal of convictions on appeal; safeguards relating to the conduct of the trial itself, such as change of venue, continuance, and severance; and safeguards relating to the selection and conduct of the jury, such as the voir dire, change of venire, the juror's oath, sequestration, and judicial instructions.

B. REVERSAL OF CONVICTIONS ON APPEAL

1. Introduction

One of the most far-reaching procedural safeguards available in the United States to ensure an accused's fair trial is the court's power to reverse an accused's conviction on appeal and to order a new trial on the basis that prejudicial publicity infringed the accused's Sixth Amendment right to an impartial jury. It has been emphasized that this can only be done in extremely compelling circumstances[94], and must be viewed as an expedient or palliative and not as a cure for the problems raised by pre-trial publicity[95].

The Supreme Court has reversed convictions in many cases where it has found that prejudicial publicity infringed the accused's right to an impartial jury[96]. Indeed, cases in which convictions have been overturned have been among the most sensational and the most publicized criminal cases in American history. The Supreme Court has established two alternate tests for determining when an accused's right to an impartial jury was so affected by publicity as to require overturning his or her conviction and ordering a new trial. Each of these is discussed below.

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[93] Friendly & Goldfarb, supra, note 3 at 113.

[94] Hagen, supra, note 2 at 748.

[95] State v. Van Duyne, 204 A.2d 841 (N.J.S.C. 1964); Maine v. Superior Court, 438 P.2d 372 (Cal. S.C. 1968).

2. The Establishment of Actual Jury Prejudice

First, the courts will reverse convictions in circumstances where the accused establishes a connection between the prejudicial publicity and the existence of actual jury prejudice[97]. This connection is often established by showing, from a review of the transcript of the voir dire held during the jury selection process, that jurors were so prejudiced against the accused that it was impossible for the accused to be impartially tried by the jury. In other words, the court must decide from a review of the voir dire whether the extent and nature of the publicity caused such a build-up of prejudice that it would have been too difficult for the jury to exclude the preconception of guilt from their deliberations[98].

For instance, in Irvin v. Dodd[99], the accused was convicted of murder after a trial marked by extensive prejudicial pre-trial publicity. This publicity included press releases issued by the police after the accused's arrest stating that he had confessed to the crime; news stories giving details of the accused's past, including his criminal record; news stories revealing the existence of a confession, the accused's police line-up identification, and the accused's attempt to plea bargain; and new stories describing him as a "confessed slayer of six", remorseless, and without conscience.

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[96] It appears that the Supreme Court began reversing such convictions in the 1950's: see, for instance, Shepherd v. Florida, 341 U.S. 50 (1951); Marshall v. United States, 360 U.S. 310 (1959).

[97] McWilliams v. United States, 394 F.2d 41 (8th Cir. 1968).

[98] United States v. Denno, 313 F.2d 364 (2nd Cir. 1963).

[99] 366 U.S. 717 (1961).

The Supreme Court reversed the murder conviction and remanded the case for further proceedings on the basis that actual jury prejudice had been established: a review of the transcript of the voir dire revealed that out of a panel of 430 potential jurors, 268 had been excluded on a challenge for cause for having fixed opinions as to the accused's guilt; 90% of potential jurors questioned had some opinion as to his guilt; and eight of the twelve jurors ultimately selected believed, even before the trial began, that he was guilty. In the words of Mr. Justice Clark[100] ,

> With his life at stake, it is not requiring too much that... [the accused] be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt.

This connection between the publicity and actual jury prejudice can also be established, at least to some extent, by evidence of the circulation of the publicity and the numbers of people that it reached. In Mayola v. Alabama[101], for example, one of the factors that led the court to refuse to reverse the accused's conviction was the accused's failure to provide circulation figures or other evidence which would show the scope of the county's exposure to the prejudicial pre-trial publicity[102].

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[100] Ibid. at 728.

[101] 623 F.2d 992 (5th Cir. 1980).

[102] See also Beck v. Washington, 369 U.S. 541 (1972), denying reversal where it could not be shown that the examination of the panel revealed such prejudice that the court could not believe the jurors' answers as to their impartiality, and where the accused's failure to challenge the jurors for cause as to lack of impartiality was strong evidence that he believed the jurors were unbiased; Murphy v. Florida, 421 U.S. 794 (1975), denying reversal partly because the voir dire showed no juror hostility to the accused as to suggest

3. Presumption of Prejudice from the Totality of Circumstances

A second test used by the courts in deciding whether to reverse an accused's conviction and send the matter back for a new trial is whether it can be determined from the totality of circumstances surrounding the trial that prejudicial pre-trial publicity so saturated the community as to make a fair trial by an impartial jury drawn from the community virtually impossible[103]. Where this is established, jury prejudice is presumed, and the accused's conviction will be overturned.

In Rideau v. Louisiana[104], for instance, the accused made admissions concerning his guilt during an "interview" with the sheriff the day after his arrest. This interview was filmed, and was widely broadcasted three times prior to the accused's trial. The interview was seen and heard by three jurors at least once prior to trial.

The Supreme Court reversed the accused's conviction on the basis that the community had been so prejudiced by the videotape that he could not obtain a fair trial in that community, and that the broadcast of the videotape was, in a very real sense to the audience, the accused's trial at which he pleaded guilty to murder. In the words of Mr. Justice Stewart, "any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality"[105]. Thus, even though actual

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a partiality that the jurors could not put aside; Patton v. Yount, 467 U.S. 1025 (1984), denying reversal even though only two out of 163 prospective jurors had not heard or read about the case prior to trial and 77% of potential jurors admitted they would carry opinions into the jury box; United States v. Ricardo, 619 U.S. 1124 (5th Cir. 1980), denying reversal because the accused had not provided circulation statistics concerning the publicity and had thus failed to show actual prejudice caused by the publicity.

[103] As set out in Mayola v. Alabama, supra, note 101.

[104] 373 U.S. 723 (1963).

[105] Ibid. at 726.

prejudice had not been established, the totality of circumstances surrounding the accused's trial indicated that his fair trial was impossible.

Likewise, in Sheppard v. Maxwell[106], where the accused was charged with and convicted of the murder of his wife, pre-trial publicity included numerous publications which revealed "evidence" which was never led at trial; which repeatedly stressed his lack of cooperation with the police and his refusal to take a lie detector test; which aired charges besides those for which he was to be tried; which dealt with his private life and portrayed him as a womanizer; and which called for his prosecution and conviction. At the same time, the media ignored evidence favourable to the accused[107].

Twelve years after his trial, the Supreme Court reversed his conviction and ordered a new trial on the basis that the totality of circumstances showed that prejudicial pre-trial publicity had so inflamed the community as to deny him a fair trial[108]. The Court also stressed that other procedural safeguards would have been sufficient at the time of the trial to guarantee him a fair trial. The Court emphasized that the trial court could have controlled this damaging publicity and its effects by proscribing extrajudicial statements by all parties to the proceedings; by sequestering the jury once the trial began; and by making stricter rules concerning the media's presence in the courtroom.

Similarly, in Coleman v. Kemp[109], the accused was convicted of the brutal murders of six people in a small community. The court reversed the conviction and remanded the matter on the basis that the totality of circumstances showed that prejudicial and inflammatory pre-trial publicity had so overwhelmed and saturated the community as to make the accused's fair trial impossible. Indeed, the publicity had made it inconceivable to believe that his guilt or innocence had been impartially assessed on the basis of the evidence. As the court pointed out, even though overwhelming evidence of the accused's guilt had been lead at trial, this was not dispositive in assessing the accused's right to a fair trial before an impartial jury[110].

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[106] 384 U.S. 333 (1966).

[107] Other examples of unfairness in his trial included his three-day, televised inquest before several hundred spectators, where he was examined for more than five hours without being allowed to have his lawyer present; the media's publication of the names and address of potential jurors three weeks before trial; media hounding of the trial participants and the accused; and the media's disruptive conduct in the courtroom during the trial, which caused chaos in the courtroom.

[108] The accused was acquitted at this trial: Friendly & Goldfarb, supra, note 3 at 20.

[109] 778 F.2d 1487 (11th Cir. 1985), cert. den. 106 S. Ct. 2289 (1986).

4. Difficulties with the Use of this Procedural Safeguard

While the court's power to reverse an accused's conviction and send the matter back for trial is intended to protect the accused's right to an impartial jury, serious questions arise as to both the desirability and the efficacy of this safeguard. Indeed, as one commentator puts it,

> It is true that he who is thus convicted [as a result of the press's prejudicial activities] does have the right to an appeal

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[110] See also Shepherd v. Florida, supra, note 96, granting reversal because pre-trial publicity and other prejudicial influences affected the jury with such force that the accused were prejudged as guilty and the trial was but a legal gesture to register a verdict already dictated by the press and the public opinion it generated; Estes v. Texas, 381 U.S. 532 (1965), granting reversal because, inter alia, publicity about a two-day pre-trial hearing had bombarded the community and denied the accused's right to a fair trial; Murphy v. Florida, supra, note 102, denying reversal on the ground that the totality of circumstances did not warrant reversal even though the pre-trial publicity had included the accused's criminal record as well as certain facts about the crime with which he was charged; Mayola v. Alabama, supra, note 101, denying reversal because the accused could not show that pre-trial publicity had so saturated and tainted the county as to poison proceedings in that county, even though the publicity included graphic coverage of his confessions and of evidence against him; centered on the theme of sexual deviance; disclosed his criminal record; included articles aimed at exploiting community sentiment against him; and referred to him as a "convicted sex pervert" and "confessed boy slayer"; People v. Manson, 132 Cal. Rptr. 265 (Ct. App. 1976), cert. den. 430 U.S. 986 (1976), denying reversal because, inter alia, presumed prejudice had not been established despite intense and widespread publicity; United States v. Haldeman, 559 F.2d 31(D.C. Cir. 1976), denying reversal because the huge publicity about the case, a prosecution arising from the "Watergate" affair, had been straight-forward, unemotional, factual accounts of events and of the investigation.

> on the ground that a fair hearing was denied him. But standing alone, this is a desperate remedy.[111]

For instance, the use of this safeguard is very expensive for both the state and for the accused, since they will have already borne the costs of the first trial and must now bear the costs of the new trial[112]. If a long time has passed between the first trial and the new trial, the accused, and of course the state, may be prejudiced by the death of witnesses or by the disappearance of relevant evidence during this intervening time[113]. Further, if the accused is acquitted at the new trial, the accused will have been unnecessarily deprived of his or her liberty during the time between the first trial and the new trial[114], and the accused's life will have been irrevocably changed. This safeguard is thus, in many respects, an inadequate remedy where an accused's right to a fair trial has been breached by the activities of the media.

This safeguard is also an inadequate remedy in that it is inconsistently applied by the courts. In other words, in many cases where the court decides not to use this safeguard because it feels that the accused's Sixth Amendment rights have not been violated by pre-trial publicity, the court's decision seems utterly at odds with the nature and extent of the publicity. Indeed, given the extreme nature of the pre-trial publicity in many of these cases, it is difficult to imagine how much more prejudicial the publicity would need to be before the court felt that it damaged the accused's right to a fair trial.

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[111] F. Berndt, "A Free Press and a Fair Trial: England vs. The United States (1961-62) 13 West. Res. L. Rev. 147 at 155-6.

[112] Meyer, supra, note 89 at 17. As R.P. Isaacson states in "Fair Trial and Free Press: An Opportunity for Coexistence" (1976-77) 29 Stan. L. Rev. 561 at 562, reversing a trial conviction cannot compensate the accused for the ordeal and expense of the trial.

[113] Meyer, ibid.

[114] In Sheppard, supra, note 106, for instance, the accused spent 12 years in jail before his conviction was reversed and he was acquitted at the new trial.

For instance, in Stroble v. California[115], a majority of the Court held that the accused had not been denied a fair trial even though pre-trial publicity included extensive excerpts of his confession released by the District Attorney on the day of arrest at periodic intervals while the accused was actually giving the confession; described the accused as a "werewolf", a "fiend", and a "sex-mad killer"; and publicized the District Attorney's statements that the accused was both guilty and sane. The Court reached this conclusion on the basis that the confession became evidence at the trial and that publicity abated in the weeks between the accused's arrest and his trial.

Likewise, in United States v. Bowe[116], the court held that the accused's right to an impartial jury had not been prejudiced because the bulk of the publicity, even though it could not have been admitted into evidence, was not "outrageously inflammatory". As well, the court emphasized that the fact that 12 weeks had passed between the publicity and the jury selection, made it unlikely that the jurors remembered the publicity.

While judicial reluctance to exercise this remedy may be partly due to a recognition of the time and expense costs involved in reversing a conviction and ordering a new trial, it is also partly due to a firm belief that the other procedural safeguards are adequate to protect the accused's right to a fair trial[117]. As is discussed below, however, this belief may be faulty.

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[115] 343 U.S. 181 (1952).

[116] 360 F.2d 1 (2nd Cir. 1966).

[117] See, for instance, Sheppard v. Maxwell, supra, note 106; McWilliams v. United States, supra, note 97.

C. SAFEGUARDS RELATING TO THE CONDUCT OF THE TRIAL

1. Change of Venue

A commonly used procedural safeguard relating to the conduct of the trial is the change of venue. While the use of this safeguard varies to some extent from state to state[118] and is entirely within the trial judge's discretion[119] , an accused must generally show a "probability of prejudice" in order to have the trial's venue changed[120] . Thus, an accused will be granted a change of venue when it can be shown that pre-trial publicity has made it probable that it will be impossible for him or her to have a fair trial before an impartial jury in the county in which the crime was committed[121].

In order for the accused to establish this reasonable likelihood of prejudice, it is not sufficient to show simply that the jurors were exposed to the publicity[122]. Instead, the accused must show that this probability of prejudice actually exists. This can be established through public opinion polls, through the court's evaluation of the nature of the publicity, and through the opinion testimony of individuals[123] . If the trial court denies the accused's change of venue motion, this exercise of the trial court's discretion will not be disturbed without a clear showing of abuse[124].

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[118] For instance, some states require an attempt to select a jury in the local area before a change of venue motion will be granted, and some states place geographical limits on the locations to which the trial can be moved: Judge P.D. O'Connell, "Pretrial Publicity, Change of Venue, Public Opinion Polls--A Theory of Procedural Justice" (1988) 65 U. Det. L. Rev. 169 at 180.

[119] Goldfarb, "Public Information", supra, note 28 at 819; United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982).

[120] O'Connell, supra, note 118 at 180.

[121] Minnesota v. Thompson, 123 N.W.2d 378 (Minn. S.C., 1963). This is the same test that is used in Canada on change of venue motions: see Chapter 4, "Procedural Safeguards".

[122] Goldfarb, "Public Information", supra, note 28 at 819.

[123] O'Connell, supra, note 118 at 180. O'Connell points out, supra, note 118 at 174, that most judges are suspicious of polls and statistics. This is also the attitude that has been taken by the Canadian judiciary: see Chapter 4, "Procedural Safeguards".

While change of venue is thus an important safeguard available to protect the accused's right to a fair trial[125], it is not perfect. For instance, it is of little benefit where a notorious case has received statewide publicity, for it will be very difficult to move the trial to a place in the state which has not been exposed to publicity about the case[126]. As Meyer states, change of venue "...has little meaning in view of the breadth of modern press, radio and television coverage and its ability to move with the trial"[127].

2. Continuance

Second, an accused may in some cases be able to obtain a continuance[128] and to have his or her trial postponed until the publicity has sufficiently abated to allow the trial to be fair. This is, however, rarely allowed in cases where the accused requests a continuance due to pre-trial publicity[129].

A number of difficulties exist with the use of this safeguard as a means of ensuring an accused's right to a fair trial. For instance, it is very difficult to determine in a particular case how long the publicity and its effects will take to abate, and to thus determine for how long the trial should be postponed[130]. Likewise, while the use of a continuance is based on the assumption that the passage of time will dampen the effects of the prejudicial publicity, many psychologists are skeptical that this actually occurs[131]. Further, even if the publicity abates during the time that the trial is postponed, the resumption of the trial is likely to trigger a new onslaught of publicity[132]. The use of a continuance also has implications for the accused's Sixth Amendment right to a speedy trial: an accused who relies upon a continuance may be forced to give up his or her right to a speedy trial[133]. As well, the practical effects of a continuance are important where an accused is in jail awaiting trial, for a lengthy pre-trial incarceration will significantly affect the accused's life[134].

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[124] O'Connell, ibid. at 180. For instance, in Juelich v. United States, 214 F.2d 950 (5th Cir. 1954), the appeal court held that the trial judge's refusal to change the venue was a reversible error where every juror had entered the jury box believing the accused to be guilty. The court reversed the conviction and remanded the case.

[125] Indeed, the Supreme Court has viewed change of venue as an important way of ensuring the "impartial jury" required by the Sixth Amendment. In Groppi v. Wisconsin, 400 U.S. 505 (1971), for instance, the Supreme Court struck down as unconstitutional a Wisconsin statute which denied an accused charged with a misdemeanour offence (an offence where the punishment is a fine of $500 or less or one year or less imprisonment) the right to a change of venue.

[126] Isaacson, supra, note 112 at 563; Friendly & Goldfarb, supra, note 3 at 98. This is the same problem that exists with the change of venue in Canada: see Chapter 4, "Procedural Safeguards".

[127] Supra, note 89 at 17.

[128] Commonly referred to in Canada as an adjournment.

[129] Friendly & Goldfarb, supra, note 3 at 99.

3. Severance

While reversal of convictions, change of venue, and continuance are the major safeguards relating to the conduct of the trial itself, an accused may also be able to rely on severance as an additional safeguard in some situations[135]. The use of severance allows an accused, in a situation where more than one person faces trial for the charge, to have his or her trial severed and to be tried separately from another co-accused who has been the subject of adverse pre-trial publicity[136].

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[130] Meyer, supra, note 89 at 17[illegible] Isaacson, supra, note 112 at 562.

[131] O'Connell, supra, note 118 at 177. Indeed, as the court stated in Maine v. Superior Ct., supra, note 95, a continuance is ineffective in a small community where a major crime has become embedded in the public consciousness.

[132] Isaacson, ibid. at 562.

[133] Ibid. See also People v. Manson, supra, note 110, where the court stated that the accused's refusal to waive his right to a speedy trial eliminated the continuance as an available solution to the problems posed by pre-trial publicity in this case; Groppi v. Wisconsin, supra, note 125, where the Court stated that continuances work against important values which are implicit in the constitutional guarantee of a speedy trial.

[134] Isaacson, supra, note 112 at 563.

[135] For a discussion of this safeguard as it exists in Canada, see Chapter 4, "Procedural Safeguards".

D. SAFEGUARDS RELATING TO THE SELECTION AND CONDUCT OF THE JURY

1. Voir Dire

A major procedural safeguard relating to the jury's selection and conduct is the voir dire, which is the questioning of a prospective juror to determine whether he or she is biased against the accused or the state. If, as a result of these questions, the prospective juror is shown to be biased, he or she can then be challenged for cause[137] and can be excluded from serving on the jury on the ground of lack of impartiality.

In relation specifically to pre-trial publicity, the voir dire examination serves as a filter to screen out prospective jurors who cannot lay aside their opinions as to the accused's guilt or innocence and render a verdict based on the evidence presented in court[138]. However, the mere exposure of a potential juror to pre-trial publicity and the fact that a juror may not be totally ignorant of the facts surrounding a particular case does not automatically mean that the juror can not render an impartial verdict based solely on the evidence presented in court[139].

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[136] C.F. Beckton, The Law and the Media in Canada (Toronto: The Carswell Company Limited, 1982) at 74.

[137] D. Suggs & B.D. Sales, "Juror Self-Disclosure in the Voir Dire: A Social Science Analysis" (1980-81) 56 Ind. L.J. 245. As well, a prospective juror can be challenged peremptorily. It should be noted that in England, by contrast, a prospective juror cannot be questioned before being challenged for cause. Instead, counsel must give particulars and must lay a ground for the challenge before a prospective juror can be challenged and questioned: see Chapter 7, "The English Experience".

[138] United States v. Liddy, 509 F.2d 428 (D.C. Cir. 1974).

In deciding whether potential jurors are impartial, it is insufficient for a trial judge to merely obtain the jurors' assurances of impartiality[140]. Instead, the trial judge must ensure that the voir dire examination of the jurors affords a fair determination that no prejudice exists. Failure to do so may result in the reversal of a conviction and the remanding of the matter for further proceedings[141].

While the actual procedure of voir dire examinations varies from state to state[142], counsel is generally allowed to ask a prospective juror a wide variety of questions before deciding whether to challenge the juror for lack of impartiality. Indeed, the range of questions asked by counsel often goes far beyond those questions strictly needed to determine the juror's impartiality, and may include questions aimed at determining whether the potential juror will be favourable to the accused and at indoctrinating the juror with the accused's position[143]. This type of "fishing expedition" is generally discouraged in other countries, such as Canada[144].

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[139] United States v. Bailleaux, supra, note 119; United States v. Ricardo, supra, note 102; People v. Manson, supra, note 110; United States v Haldeman, supra, note 110.

[140] Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968), cert. den. 400 U.S. 1022 (1971); United States v. Denno, supra, note 98.

[141] See, for instance, Silverthorne v. United States, ibid.

[142] For instance, as Suggs & Sales point out, supra, note 137 at 251, 19 states give counsel primary control over the conduct of the voir dire, 15 states give the judge complete control although counsel can submit questions for the judge to ask, and the rest of the states divide responsibility for conduct of the voir dire between the judge and counsel. See also Goldfarb, "Public Information", supra, note 28 at 820; J.B. McConahay et al., "The Uses of Social Science in Trials with Political and Racial Overtones: The Trial of Joan Little" (1977) 41 Law & Contemp. Probs. 205 at 213.

[143] A. Gold, "The Jury in the Criminal Trial", in V.M. Del Buono, ed., Criminal Procedure in Canada (Toronto: Butterworth & Co. (Canada) Ltd., 1982) 381 at 401.

[144] See Chapter 4, "Procedural Safeguards".

The efficacy of this safeguard is limited by several factors. For instance, since the potential jurors will be questioned as to their knowledge of the prejudicial publicity, the *voir dire* may actually compound the problem by refreshing the jurors' recollection of the publicity, and can thus be self-defeating in sensational, widely publicized cases[145].

Further, reliance on the *voir dire* is based on the assumption that jurors will be consciously aware of and will openly admit their biases and prejudices, and can thus be identified by the *voir dire* as lacking impartiality. However, this assumption does not recognize the fact that jurors may lie about their biases and beliefs, or may have unconscious prejudices and biases of which they are not aware[146] . The *voir dire* will thus not identify those jurors who either consciously or unconsciously hide their prejudices and biases during the *voir dire* examination.

2. Change of Venire

A second procedural safeguard relating to the selection and conduct of the jury is the accused's right to a change of venire. In other words, in cases where it is considered that the local jury panel has been seriously tainted by prejudicial pre-trial publicity, an accused may be able to ask the court to bring in a jury from a nearby district less affected by the publicity[147]. In this way, the disruption caused by a change of venue can be avoided[148].

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[145] Meyer, *supra*, note 89 at 18; Friendly & Goldfarb, *supra*, note 3 at 103.

[146] H. Zeisel & S.S. Diamond, "The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court" (1977-78) 30 Stan. L. Rev. 491 at 531; R.J. Simon, "Does the Courts' Decision in *Nebraska Press Association* Fit the Research Evidence on the Impact on Jurors of News Coverage?" (1976-77) 29 Stan.L. Rev. 515 at 517.

[147] O'Connell, *supra*, note 118 at 179; Friendly & Goldfarb, *supra*, note 3 at 97. This safeguard does not appear to exist in Canada.

[148] O'Connell, *ibid*.

However, the change of venire is of little value in cases where the publicity has been extensive and statewide, and is not often used[149]. As well, it does not protect the out-of-county jurors from the influence of publicity during the actual trial itself[150].

3. Sequestration, the Juror's Oath, and Judicial Instructions

Other procedural safeguards which relate to the conduct and selection of the jury and which are often relied upon by American courts include sequestration; the juror's oath; and the trial judge's instructions to the jury[151]. Sequestration, or the isolation of the jury from contact with the public during a trial, operates primarily to protect jurors from publicity occurring during the trial rather than occurring prior to the trial, and is thus relatively ineffective as a means of protecting jurors from pre-trial publicity[152]. The effectiveness of this safeguard is also limited by the fact that in many cases, pre-trial publicity may have damaged the jury's impartiality to such an extent that the damage is not repairable by sequestration[153].

The oath sworn by the jurors to impartially decide the case solely on the basis of the evidence presented in court has been relied upon by American courts as being an effective means of ensuring a juror's impartiality. Indeed, courts have stated that once jurors take their oath, they must be trusted to act as honest and impartial judges of the facts[154]. However, there has been little analysis of the actual effectiveness of the oath as a means of ensuring the impartiality of the jurors.

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[149] Ibid. See also W.H. Kesterton, The Law and the Press in Canada (Toronto: McLelland & Stewart Limited, 1976) at 23.

[150] Meyer, supra, note 89 at 17. It should be noted that the change of venire is related to some extent to the use of "blue-ribbon" juries. In trials which will involve particularly difficult or complicated evidence, special juries are chosen by questionnaire, primarily on the basis of intelligence, for those trials. These juries are considered to be more impartial and detached, although there is no proof of this: Goldfarb, "Public Information", supra, note 28 at 822; Fay v. New York, 332 U.S.261 (1947).

[151] These safeguards as they exist in Canada are discussed in Chapter 4, "Procedural Safeguards".

[152] Isaacson, supra, note 112 at 564.

[153] Kesterton, supra, note 149 at 25.

Finally, many American courts have relied heavily on the trial judge's instructions to the jurors to decide the case solely on the basis of evidence presented in court as an effective way of securing the accused's Sixth Amendment right to an impartial jury. As one commentator puts it[155],

> ...some judges are convinced that by their charismatic instructions they can dissipate juror prejudice. Whether this conviction is self indulgence or reality is unknown.

There has been debate over the efficacy of these instructions. While some commentators have stated that a judge's cautionary instructions to the jury are far more effective than skeptics would expect and that empirical studies have indicated that instructions are "surprisingly effective"[156], other commentators have disagreed and have stated that jurors have consciously disregarded their instructions in many cases and that instructions may go unheeded[157]. Indeed, requiring jurors to put aside all preconceptions and opinions, whether formed by pre-trial publicity or otherwise, may be expecting too much of them. As one commentator states,

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[154] See, for instance, Application of Cohn, 332 F.2d 976 (2nd Cir. 1964). See also Simon, supra, note 146 at 528, where Simon states that experiments to date indicate that for the most part juries are able and willing to put aside extraneous information and base their decisions on the evidence.

[155] O'Connell, supra, note 118 at 182.

[156] Hagen, supra, note 2 at 751-752.

[157] See, for instance, American Bar Association, Standards Relating to Fair Trial and Free Press, 1968 at 61 (hereafter referred to as the Reardon Report); Goldfarb,"Public Information", supra, note 28 at 821; Meyer, supra, note 89 at 19; Isaacson, supra, note 112 at 566-7.

> A second critical assumption of the adversary model is that the juror...understands the concept of presumption of innocence and is willing to apply it, can set aside his or her emotions and prior knowledge, and can render a decision based solely on the admissible evidence while properly applying the reasonable doubt standard. These traits and skills are even rare among scholars and scientists who have been trained to acquire them at great expense and over years of time. Consequently, in the current American system, we have to use mortals who fall short of the ideal.[158]

E. CONCLUSION

In summary, the use of procedural safeguards is an important means by which an accused's right to an impartial jury is protected. However, drawbacks exist with these safeguards which significantly weaken their actual effectiveness as ways of preserving an accused's Sixth Amendment rights. For instance, they are ineffective in cases which have received extensive prejudicial publicity and which are thus most in need of protection. Indeed, given the sophistication and pervasiveness of today's mass media, these safeguards can not effectively guarantee juror impartiality in highly publicized cases. In the words of Goldfarb, "the all-pervasive nature of modern mass media renders the traditional instruments for insuring a fair trial of questionable value"[159] .

Further, reliance upon many of these safeguards is often founded upon untested assumptions as to their efficacy. As well, an accused who wishes to take advantage of these safeguards must often waive other important, constitutionally guaranteed rights such as the right to a speedy trial[160].

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[158] McConahay et al., supra, note 142 at 223.

[159] "Public Information, Criminal Trials and the Cause Celebre", supra, note 28 at 821.

[160] As Shellow states, supra, note 73 at 484, "it seems obvious, therefore, that the regime of 'alternative means' established by the Supreme Court as a substitute for restraints on the press, at least may force a defendant to waive many other important rights in order to attempt to secure a trial before an impartial jury".

Standing alone, therefore, these safeguards are an inadequate means of protecting an accused's right to a fair trial before an impartial jury.

VII. CONCLUSION

As a result of the overwhelming emphasis placed in the United States upon freedom of speech, American courts are virtually handcuffed when attempting to deal with the problems created by pre-trial publicity[161]. In particular, the priority given to the First Amendment and to the media's freedom of expression has resulted in the sharp curtailment of sub judice constructive contempt as an effective means of protecting an accused's right to an impartial jury and of punishing members of the media who breach this right; in the restriction of defamation law proceedings as a remedy for an accused whose reputation has been damaged by prejudicial pre-trial publicity; and in the striking down of prior restraints upon the media in situations where such prior restraints are aimed at preventing the publication of pre-trial publicity. When these curtailments are viewed in conjunction with the limited efficacy of the procedural safeguards, the picture that emerges is one of a media running roughshod over an accused's right to a fair trial before an impartial jury.

There has been some recognition of the significance of this problem by bar and press associations and by various commissions in the United States[162]. For instance, studies and reports, such as the Reardon Report[163], have attempted to deal with the problem by emphasizing the use of the procedural safeguards and by placing restrictions on officers of the court, such as counsel and other court personnel, which prevent them from communicating to the media matters which would impair the accused's fair trial[164]. Many states have also established voluntary press-bar committees, which have issued guides for the bar and media setting out recommended standards of conduct in situations involving pre-trial publicity[165]. These recommendations and guidelines have, however, been largely ineffective[166].

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[161] Beckton, supra, note 136 at 73.

[162] For a discussion of bar association, press association, and commission responses to this problem, see D.G. Stephenson, Jr., "Fair Trial--Free Press: Rights in Continuing Conflict" (1979-80) 46 Brooklyn L. Rev. 39 at 51-58; Friendly & Goldfarb, supra, note 3 at 123-139.

[163] Supra, note 157.

As a result of the American emphasis on freedom of expression, then, an accused whose fair trial is damaged by pre-trial publicity has few remedies. In many cases, the most that can be done for an accused is to reverse his or her conviction and to order a new trial. Given that an accused may have spent many years in prison; that the accused must bear the expense of the new trial; and that the accused's defence may be impaired by the disappearance of witnesses and the destruction of evidence during the intervening time between trials, this remedy is grossly inadequate and unfair.

This lack of adequate protection for an accused is further exacerbated by the fact that the media itself is never held responsible for the damage it has caused. As one commentator states ,

> ...he who is accused of an obnoxious crime in the United States must, almost as a matter of course, endure the unhappy fate of scrutiny by the press. It is the added burden of any accused, whether guilty of innocent. The newspapers, of course, do not have to pay for the exercise of their rare privilege to know and to speak.[167]

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[164] See, for instance, the Reardon Report, ibid.; The Rights of Fair Trial and Free Press: The American Bar Association Standards, 1981.

[165] Stephenson, supra, note 162 at 52-53.

[166] Goldfarb, "Public Information", supra, note 28 at 824.

[167] Berndt, supra, note 111 at 147. Likewise, H.J. Abraham states in Freedom and the Court: Civil Rights and Liberties in the United States, 4th ed. (New York: Oxford Community Press, 1982) at 163 that "it is difficult enough to find the line [between free press and fair

This lack of media responsibility is unacceptable in a society which has as one of its constitutional principles the right of an accused to be fairly tried before an impartial jury. While measures such as contempt of court proceedings, defamation proceedings, and prior restraints may to some extent infringe upon the American media's absolute right to publish whatever material it chooses without regards for the rights of those about whom it publishes, these restrictions upon the media are justifiable. Indeed, it does not seem to be asking too much for the media to be held accountable for the damage it causes by its abuses. In the words of Stanton,

> Whether the life or liberty of any individual in this land is permitted to be put in jeopardy because of actions of any news media ought not to be even debatable. Such practices as publication of alleged confessions, declarations of guilt made by police, and attempts to try cases in the press, away from the safeguards of the courtroom, ought to be eliminated in a just society.[168]

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trial] when responsibility obtains, but how much more so when the press ignores its responsibility? Must we really continue to believe that there is an unlimited right to conduct ex parte public trials in the press, on the radio, and on television?"

[168] F. Stanton, "Free Press v. Fair Trial: The Broadcaster's View" (1964-65) 41 N.D.L. Rev. 7 at 9.

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CHAPTER 7

THE ENGLISH EXPERIENCE

I. INTRODUCTION

While the preceding chapter concentrated on the American experience in resolving the problems created by pre-trial publicity and its effects on an accused's rights, this chapter concentrates on the English experience in dealing with these problems. As will be seen, the English experience is very different from the American experience. Indeed, the means adopted in England and in the United States to deal with pre-trial publicity can be characterized as resting at two extreme ends of a scale, with the Canadian experience falling somewhere in the middle.

II. FREE SPEECH AND FAIR TRIAL: AN OVERVIEW

In England, as in Canada and the United States, the conflict between free speech and fair trial arises from the conflict between two basic principles: freedom of expression, and the right of an accused to a fair trial before an impartial tribunal. While these principles are central to the English legal system, they are not, unlike in Canada and the United States, part of any entrenched Charter of Rights or Constitution[1].

In dealing with the conflict between these two fundamental principles, English courts have taken an entirely different approach from that adopted in the United States and, to a lesser extent, from that adopted in Canada. In England, an accused's right to a fair trial before an impartial tribunal has been given primacy over freedom of expression. As one commentator put it, "...English law values the independence of the courts and the right of fair trial above the freedom of the press to report everything which has news value"[2].

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[1] As C.F. Beckton states, "In Great Britain, the approach to free press--fair trial is based upon judicial control and political restraint rather than any provisions in a written constitution": The Law and the Media in Canada (Toronto: The Carswell Company Limited, 1982) at 70.

As a result of this primacy given to an accused's right to a fair trial, English courts attempt to discourage the publication of prejudicial pre-trial publicity by punishing those responsible for the publicity[3]. Indeed, contempt of court proceedings are the most frequently used means of dealing with pre-trial publicity[4].

Many commentators feel that this reliance by English courts upon contempt of court proceedings has proven to be a remarkably successful way of dealing with the evils of "trial by newspaper". Indeed, commentators seem to assume that the English approach of dealing with pre-trial publicity through contempt proceedings is a much stricter and more desirable approach to pre-trial publicity than has been taken in other countries[5], and that this approach has effectively ended the problems of trial by media[6]..

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[2] T.S. Schattenfield, "Judicial Independence and Freedom of the Press" (1954-1955) West. Res. L. Rev. 175 at 177.

[3] L.L. Jaffe, "Trial by Newspaper" (1965) 40 N.Y.U.L. Rev. 504 at 513; Comment, "Free Speech vs. The Fair Trial in the English and American Law of Contempt by Publication" (1949-50) 17 U. Chi. L. Rev. 540. It is interesting to note, however, that prior restraints, which are another way of discouraging pre-trial publicity at its source, have received relatively little attention in England.

[4] Beckton, supra, note 1 at 70.

[5] Ibid. See also Schattenfield, supra, note 2 at 180-181. This view is not shared by everyone. For instance, T.B. Smith states, in "Public Interest and the Interests of the Accused in the Criminal Process--Reflections of a Scottish Lawyer" (1957-58) 32 Tul. L. Rev. 349 at 364, that the English and American attitudes to pre-trial publicity are shocking to the Scottish, who take a much stricter approach to pre-trial publicity and who severely restrict what the press can publish after an accused is charged.

[6] See, for instance, F. Berndt, "A Free Press and a Fair Trial: England vs. The United States" (1961-62) West. Res. L. Rev. 147 at 159, where Berndt makes the sweeping assertions that in England abuse by the press has been cured, and that constructive

Perhaps as a result of this almost unquestioned assumption that sub judice constructive contempt proceedings will cure any problems created by prejudicial pre-trial publicity, English courts and commentators have paid little recognition to the ongoing problems created by pre-trial publicity once it has reached the public. Indeed, English courts and commentators seem almost oblivious to the fact that the publicity's effects will continue to exist and may well cause great prejudice to an accused's fair trial even after those who are responsible for the publicity have been punished through contempt of court proceedings[7]. As a result, little emphasis is placed in England on the use of procedural safeguards, such as change of venue and jury challenges, to ensure a fair trial once prejudicial information has been published.

This approach to dealing with prejudicial pre-trial publicity is in striking contrast to the American experience, and to a lesser extent, to the Canadian experience. In the United States, very little attention has been paid to discouraging and suppressing prejudicial publicity at its source, and the use of contempt of court as a means of protecting an accused's right to a fair trial has been drastically curtailed. Instead, American courts rely primarily upon procedural safeguards to ensure that the accused's trial is fair[8]. Likewise, in Canada, while the courts are concerned with discouraging and suppressing

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contempt of court is the only remedy that has proved successful in dealing with prejudicial publicity. See also A.H. Robbins, "The Hauptmann Trial in the Light of English Criminal Procedure" (1935) 21 A.B.A. J. 301, where he states that trials in England are conducted in a scrupulously free and dignified way and that English criminal courts are admirable models; N.J. Freedman, "Fair Trial--Freedom of the Press" (1964-65) 3 Osgoode Hall L.J. 52 at 61, where he states that the English law of constructive contempt has been reasonably successful in preventing attempts to prejudice the hearing of criminal cases.

[7] Indeed, as Z. Cowen points out in "Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law" (1965-66) 41 Ind. L.J. 69 at 71, English contempt rules do not always effectively protect an accused from serious prejudice in a notorious case, and the sensational English press does in fact create an atmosphere of prejudice.

[8] The American experience is discussed in Chapter 6.

prejudicial publicity at its source and do indeed rely upon contempt of court proceedings as means of dealing with pre-trial publicity, the courts also recognize and deal with the ongoing effects of the publicity through use of the procedural safeguards.

In order to understand the English experience, three main topics will be considered. First, sub judice constructive contempt will be discussed. Second, the law of defamation will be considered in relation to protecting an accused's interest in his or her reputation when that reputation is damaged by pre-trial publicity. Third, the limited procedural safeguards that do exist in England to protect an accused's right to a fair trial will be discussed[9] .

III. CONTEMPT OF COURT

A. INTRODUCTION

At one time, the law of constructive contempt of court was very similar in Canada, the United States, and in England. In recent times, however, both the American and the English law of contempt of court have been modified. In the United States, constitutional law changes beginning in the 1940's have resulted in the drastic curtailment of contempt of court in general, and of sub judice constructive contempt in particular. These constitutional changes were intended to protect freedom of the press and of speech.

Likewise, in England, changes to contempt law beginning in the early 1960's have also reduced, although to a much lesser extent than in the United States, the effectiveness of sub judice constructive contempt as a means of ensuring an accused's trial. These changes to English contempt law were intended both to ameliorate the harshness of the traditional common law of contempt of court and, to some extent, to protect freedom of expression.

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[9] It must be emphasized that this discussion of the English experience is not meant to be an exhaustive analysis of English law, but rather is intended to serve as a general overview for the purposes of comparison with the Canadian and American experiences.

As a result of these changes, English contempt of court law, and in particular sub judice constructive contempt law, is now a less effective means of discouraging pre-trial publicity at its source than is Canadian constructive contempt law, which has not been modified[10]. This is somewhat ironic, in light of the traditional, almost unquestioned assertions by commentators that English contempt of court law represents the strictest and thus the most desirable means of dealing with prejudicial pre-trial publicity.

B. TRADITIONAL SUB JUDICE CONSTRUCTIVE CONTEMPT IN ENGLAND

Until the early 1960's, the basic principles of sub judice constructive contempt law were very similar in both England and in Canada. For instance, the English law of sub judice constructive contempt was intended, as was Canadian contempt law, to ensure that an accused was tried before a tribunal whose impartiality had not been impaired by pre-trial publicity. Thus, sub judice constructive contempt existed in England to discourage the publication of extraneous and prejudicial information, since English courts feared that a jury could be swayed by such information[11]. As well, while it was thought that a judge would, as a result of his or her training, be better able to put aside such extraneous influences than would a layperson, it was also recognized that a judge might nonetheless be affected by pre-trial publicity[12].

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[10] Indeed, Canadian sub judice constructive contempt law has been described by one writer as being "...the most mechanical application of the sub judice rule found anywhere in the Common Law world": L.E. Shifrin, "The Law of Constructive Contempt and Freedom of the Press" (1966) 14 Chitty's L.J. 281 at 293. For a discussion of Canadian contempt of court law, see Chapter 3, "Contempt of Court".

[11] R. v. Duffy, [1960] 2 Q.B. 188.

Sub judice constructive contempt could be committed in both England and Canada through the publication of material calculated or intended to interfere with an accused's pending trial[13]. Proceedings were considered to be "pending" from the time when they were probable or imminent until the time after an appeal was heard or until the time for appeal had expired.[14]

Liability for sub judice constructive contempt in England, as in Canada, was strict: mens rea in the sense of an actual intent to prejudice a pending trial was not necessary. The only intent required to support a finding of sub judice constructive contempt was the intent to publish the impugned material. Thus, liability could be established if the publication simply had the effect or the tendency of interfering with the pending legal proceeding, and a lack of intent to prejudice the pending trial was not a valid defence to a charge of sub judice constructive contempt[15].

In addition to these substantive similarities between English and Canadian constructive contempt law, procedural similarities also existed between the contempt laws of these two countries. In particular, sub judice constructive contempt in England was triable either by indictment or by summary procedure, although in both England and Canada, procedure by indictment has fallen into disuse and is now almost unheard of[16]. As well, both English and Canadian courts and commentators emphasized that the summary procedure must be exercised with great caution, since it dispensed with many of the procedural safeguards available to accused in other types of criminal proceedings[17].

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[12] R. v. Davies, [1945] 1 K.B. 435.

[13] This basic test of liability is set out in many English cases: see, for instance, R. v. Payne, [1896] 1 Q.B. 577; Re "Pall Mall Gazette" (1894), 11 T.L.R. 122 (Ch.); In the Matter of the "Finance Union" (1895), 11 T.L.R. 167 (Q.B.); Re Labouchere (1901), 17 T.L.R. 578 (Q.B.); Hunt v. Clarke (1889), 61 L.R. 343 (C.A.); R. v. Duffy, supra, note 11; R v. Editors, Printers and Publishers of the "Daily Herald", Ex parte Rouse (1931), 75 Sol. J. 119 (Q.B.).

[14] Sir G. Borrie & N. Lowe, Borrie and Lowe's Law of Contempt, 2nd ed. (London: Butterworth & Co. (Publishers) Ltd., 1983) at 162 (hereafter referred to as Borrie and Lowe); R. v. Davies, supra, note 12.

[15] Borrie and Lowe, ibid. at 70; A. Arlidge & D. Eady, The Law of Contempt (London: Sweet & Maxwell, 1982) at para. 3-01; R. v. Odhams Press Ltd., [1957] 1 Q.B. 73.

English and Canadian courts considered similar types of pre-trial publications to amount to sub judice constructive contempt. For instance, English courts have considered the publication of a accused's photograph, before witnesses to the crime have the opportunity of identifying the accused at a line-up and where it is apparent to a reasonable person that the question of identity may arise at trial, to be contempt[18]. Of course, where it is clear at the time the photograph is published that the accused's identity will not be in issue at trial, publication of the photograph will not amount to contempt[19].

Likewise, English courts have considered the publication of evidence obtained through private media investigations to be sub judice constructive contempt. For instance, in R. v. Tibbits[20], articles which contained information purporting to be the result of investigations made by the paper's own "Special Crime Investigator" amounted to constructive contempt[21].

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[16] Indeed, the last known English case where sub judice constructive contempt was dealt with by way of indictment is R. v. Tibbits, [1902] 1 K.B. 77.

[17] See, for instance, R. v. Griffin (1988), 88 Cr. App. R. 63 (C.A.); Halsbury's Laws of England, 4th ed., vol. 9 (London: Butterworths & Co. (Publishers) Ltd., 1974) at para. 87 (hereafter referred to as Halsbury's).

[18] See, for instance, R. v. Daily Mirror, [1927] 1 K.B. 845, stating that there is a duty to refrain from publishing an accused's photograph where it is apparent that the question of identity may arise. This is also the case in Scotland: see Stirling v. Associated Newspapers Ltd., [1960] S.L.T. 5 (H.C.), stating that the publication of photographs may gravely prejudice a trial by affecting the evidence of identification at trial by witnesses who had already seen the photo; Atkins v. London Weekend Television Ltd., [1978] S.L.T. 76 H.C.).

[19] As was the case in R. v. Lawson, Ex parte Nodder (1937), 81 Sol. J. 280 (K.B.), where the police had already issued a full description of the accused and where there was no difference between this description and the photograph.

[20] Supra, note 16.

It has also been considered to be sub judice constructive contempt to publish information about an accused's past life, and, in particular, about an accused's involvement in prior criminal offences. As the court stated in R. v. Border Television, ex parte Attorney-General[22],

> If there is one principle of English criminal law more sacred than any other it is that reference must in no circumstances be made to other offences which either pre-date those which are charged or which are excluded for some reason, lest the prisoner be prejudiced by the jury's knowledge that there are these other offences which have been committed or alleged.

Thus, it has been a contempt in England to publish articles describing the accused as a vampire, stating that the accused had been charged with and had actually committed other murders, and giving the names of these alleged murder victims[23].

English courts have also held that it is sub judice constructive contempt for the media to publish information concerning an accused's confession[24]; information concerning ongoing civil matters which relate to the same incident as the criminal proceedings[25]; information intended to damage the prosecutor and glorify the accused[26]; and information creating community hostility against the accused[27]. As well, English courts would likely find contemptuous those publications which prejudged a case's merits, which imputed guilt or innocence to the accused, or which commented on the accused's previous bad character[28].

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[21] See also R. v. Editor, Printer and Publisher of the "Surrey Comet", ex parte Baldwin (1931), 75 Sol. J. 311 (K.B.), where the paper was found to have committed contempt of court because it had "busied itself in the deplorable enterprise of collecting materials which might thought to be of interest concerning that which had been done and the person who, it was expected, would be charged", and because the paper had acted with cynical indifference for the interests of the accused. See also Stirling v. Associated Newspapers Ltd., supra, note 18; R. v. Evening Standard (1924), 40 T.L.R. 833 (K.B.).

[22] (1978), 68 Cr. App. R. 375 at 377 (Div. Ct.).

[23] R. v. Bolam, ex parte Haigh (1949), 93 Sol. J. 220 (Div. Ct.). The court described these articles as being a "disgrace to English journalism", as violating "every principle of justice and fair play which it had been the pride of this country to extend to the worst of criminals", and as pandering to sensationalism in order to increase the paper's circulation. For other cases holding it to be sub judice constructive contempt to refer to the accused's past life, see R. v. Parke, [1903] 2 K.B. 432; R. v. Evening Standard Co., [1954] 1 Q.B. 578; and R. v. Thomson Newspapers Ltd., [1968] 1 All E.R. 268 (Q.B.).

[24] R. v. Clarke, ex parte Crippen, [1908-1910] All E.R. 915 (K.B.), where the newspaper published information that the accused, who was charged with the murder of his wife, had confessed to the killing but had denied that it was murder.

C. MODIFICATION OF TRADITIONAL CONTEMPT OF COURT LAW

1. Introduction

While the English and the Canadian law of constructive contempt of court law were thus initially very similar, modifications to the English law of constructive contempt, beginning with the Administration of Justice Act, 1960 (U.K.), and culminating with the Contempt of Court Act 1981 (U.K.)[29], have lessened its effectiveness as a means of protecting an accused's right to a fair trial. These modifications are largely attributable to dissatisfaction with many aspects of the traditional common law of contempt[30], and, in particular, to dissatisfaction with the strict liability element of constructive contempt and with the law's refusal to recognize lack of intent as a defence. These changes are also attributable, at least to some extent, to a desire to bring the English law in this area into line with the European Convention on Human Rights and with the protection given thereunder to freedom of speech.

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[25] R. v. Astor (1913), 30 T.L.R. 10 (K.B.), where the court found this to be contempt on the basis that it might tend to prejudice the jurors, since they were not trained lawyers able to distinguish the exact relevance of the various charges.

[26] R. v. J.G. Hammond and Co. (1914), 30 T.L.R. 490 (K.B.).

[27] As was the case in R. v. Davies, [1906] 1 K.B. 32, where the contemner created community feeling against the accused, who was charged with abandoning a child, through the publication of very prejudicial articles about her.

[28] Halsbury's, supra, note 17, at paras. 11-13.

[29] 1981, c.49.

[30] For instance, writers have criticized traditional English contempt law as being vague and uncertain and as needing modernization and codification: see, for instance, A. Samuels, "Reform of the Law of Contempt" (1972) 122 New L.J. 396; G. Borrie, "Report on Contempt" [1975] Crim. L.R. 127.

2. Administration of Justice Act, 1960

One of the earliest areas of discontent with traditional constructive contempt of court law concerned the liability of distributors for contemptuous information contained within the magazines, newspapers, books, and other material they distributed. Traditionally, a distributor was liable for contempt of court if the material that was distributed contained information which had the tendency or effect of interfering with a pending proceeding. A distributor could thus be found guilty of sub judice constructive contempt regardless of whether the distributor had intended to interfere with the proceeding or of whether the distributor knew of the existence of the proceeding.

This principle was reaffirmed in R. v. Odhams Press Ltd.[31] and R. v. Griffiths[32]. In Odhams, the court emphatically rejected a defence of lack of knowledge or lack of intent. In this case, a newspaper published a series of articles alleging that the accused was engaged in the business of purveying vice and managing prostitutes, and urging his arrest and prosecution. The newspaper's owner and editor, as well as the reporter responsible for the story, were found guilty of contempt of court even though they did not know that proceedings were pending. The court declared that mens rea, in the sense of an intent to prejudice an accused's trial, is not a requirement of contempt law.

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[31] Supra, note 15.

[32] [1957] 2 Q.B. 192.

In Griffiths, this principle was stretched still further to cover distributors of contemptuous material in addition to those persons more directly responsible for the material. Here, copies of a foreign magazine containing highly prejudicial information concerning a medical practitioner's pending murder trial went on sale in England. The distributors of the magazine were found guilty of constructive contempt, even though they did not know the contents of that particular issue.

These cases sparked a public outcry[33], which eventually culminated in the enactment of s.11 of the Administration of Justice Act, 1960 (U.K.)[34]. This provision set out a defence of innocent publication and distribution. Thus, a publisher of contemptuous material could avoid conviction for contempt of court if he or she could establish that at the time of publication and after having taken all reasonable care, he or she did not know and had no reason to suspect that the proceedings were pending or imminent. Likewise, a distributor of contemptuous material could also avoid conviction if he or she could establish that at the time of distribution and after having taken all reasonable care, he or she did not know that the publication contained contemptuous material and had no reason to suspect that it likely did.

To some extent, then, this modification of the traditional law of constructive contempt made it slightly more difficult for an accused to protect his or her right to a fair trial, at least in relation to holding publishers and distributors responsible for pre-trial publicity contained in the published or distributed material. This modification to the traditional common law did, not, however, affect the liability of those persons more directly responsible for the publicity, such as the editor of the publication in which the publicity appeared and the writer or reporter responsible for the publicity.

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[33] By contrast, similar Canadian cases holding a distributor to be liable did not spark any public outcry: Shifrin, supra, note 10 at 292. The principle of strict liability continues to apply in Canada to distributors as well as to those people more directly responsible for the publication: see, for instance, R. v. Bryan (1954), 108 C.C.C. 209 (Ont. H.C.).

[34] 1960, c.65. This section was later repealed by the Contempt of Court Act 1981, supra, note 29, and was replaced by s. 3 of that Act.

3. Phillimore Report

The next major attempt to deal with the uncertainties and deficiencies of contempt of court law came with the Phillimore Report[35]. The Phillimore Committee was appointed in 1971 to study the law of contempt of court, and released its Report in 1974[36]. The Report contained relatively wide-ranging recommendations for reform of contempt of court. These recommendations were intended to eliminate the uncertainties in the common law wherever possible and to adjust the balance in favor of free speech[37], although the Committee recognized and accepted the need to protect the due administration of justice through contempt law[38].

In relation specifically to *sub judice* constructive contempt, the Report recommended that the rule of strict liability be maintained for those publications which, either intentionally or otherwise, create a risk of serious prejudice to the course of justice. As well, the Report redefined the time during which criminal proceedings are "pending" by recommending that this rule of strict liability should only apply from the time that an accused is charged or a summons served until the time when a verdict has been returned and sentence pronounced.

In relation to defences to a charge of *sub judice* constructive contempt, the Report recommended that the defence of innocent publication and distribution set out in s.11 of the Administration of Justice Act, 1960 (U.K.) be retained; that it should be a defence to show that the publication was a fair and accurate report of legal proceedings in open court published contemporaneously and in good faith; and that it should be a defence to show that a publication formed part of a legitimate discussion of matters of general public interest which only incidentally and unintentionally created a risk of serious prejudice to particular legal proceedings.

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[35] The Phillimore Report is summarized at [1975] Crim. L.R. 123.

[36] Arlidge & Eady, *supra*, note 15 at para. 1-39.

[37] *Borrie and Lowe*, *supra*, note 14 at 81.

[38] Phillimore Report, *supra*, note 35. See also *Borrie and Lowe*, *ibid*. at 80.

The Report also recommended that while the court's power to impose fines on a contemner should remain unlimited, the length of possible imprisonment should be limited to a maximum period of two years. As well, the Report recommended that all sentences of imprisonment for contempt of court should be for fixed rather than for indefinite terms.

The Phillimore Report thus recommended several substantial changes to sub judice constructive contempt. These changes would have made it more difficult for an accused to rely on contempt of court as a means of dealing with pre-trial publicity. For instance, restricting the use of the strict liability principle to those publications creating a risk of serious prejudice to an accused's trial would have prevented the accused from relying on this principle when proceeding against persons responsible for publications creating a lesser risk of prejudice to the trial[39]. An accused would thus presumably have been required to establish some degree of mens rea on the part of those persons.

As well, the recommended defences set out in the Report would also have made constructive contempt of court a less effective means, at least to some extent, of ensuring an accused's right to a fair trial. For instance, allowing a defence of fair and accurate reporting of legal proceedings in open court would seem to allow the publication of evidence from preliminary hearings, even though the publication of such evidence could very well affect the fairness of the accused's subsequent trial[40].

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[39] As opposed to the traditional common law standard of strict liability, which held a contemner strictly liable for publications which simply had the tendency of interfering with a pending proceeding.

The recommendations set out in the Phillimore Report were widely supported and praised[41]. However, despite the fact that the recommendations were a significant step towards ameliorating the harshness of the traditional common law, they were not implemented by the government[42].

4. The European Court of Human Rights and The Sunday Times Case

The third major impetus for reform of the traditional English law of constructive contempt came with the Sunday Times case[43] and the decision of the European Court of Human Rights. This case arose from the Thalidomide tragedy of the early 1960's, where many pregnant women who took the drug Thalidomide gave birth to children with disabilities. By 1972, 389 outstanding negligence claims brought by the parents against the drug's manufacturer were near settlement. The Sunday Times newspaper began a series of articles on the Thalidomide cases, which were intended to assist the plaintiffs in obtaining a more generous settlement. The first article criticized the amount of the settlement to be paid to each victim. The editor sent the second article, which dealt with the history of the drug's testing, manufacture, and marketing, to the Attorney-General for approval prior to its publication.

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[40] The ability of the English media to publish reports of evidence admitted in open court at preliminary hearings (or committal hearings, as they are referred to in England) has had an interesting history. At one time, such publications were considered libelous. This changed with the Law of Libel Amendment Act, 1888 (U.K.), 51 & 52 Vict. c.64, which made these publications privileged and which seemed to open the door to the reporting of highly prejudicial evidence obtained from preliminary hearings. These reports were still considered to be contempt at common law, although the defence suggested by the Phillimore Report and later implemented in the Contempt of Court Act 1981 (U.K.), supra, note 29, changed this. However, the courts have attempted to deal with the dangers posed by such reporting by placing various restrictions on the reporting of Court proceedings, such as those set out in the Magistrates' Courts Act 1980 (U.K.), 1980, s.8, which limit what the media may publish in relation to committal hearings.

[41] See, for instance, Borrie, supra, note 30.

[42] Indeed, in March 1989, the government issued a "Green Paper on Contempt of Court" which expressed misgivings as to some of the Report's specific recommendations: N.L. Nathanson, "The Sunday Times Case: Freedom of the Press and Contempt of Court under English Law and the European Human Rights Convention" (1979-80) 68 Ky. L.J. 971.

[43] Sunday Times v. United Kingdom (1979-80), 2 E.H.R.R. 245 (Eur. Court H.R.), rev'g (sub nom A.G. v. Times Newspapers Ltd.) [1974] A.C. 273 (H.L.).

The Attorney-General obtained an injunction restricting publication of this article on the basis that its publication would constitute a contempt of court. This injunction was rescinded by the Court of Appeal, but was restored, although in a more restrictive form than originally granted, by the House of Lords.

The injunction granted by the House of Lords prohibited any expressions of opinion in this case which could provoke public discussion and which could thus lead to a "trial by newspaper". The House of Lords relied on the "pre-judgement" principle to justify granting the injunction. This principle holds that it is a contempt to publish material which prejudges the issue of pending litigation or which is likely to cause public prejudgement of that issue. Such publication is considered to be contempt because of the risk it poses to the administration of justice in general, even if the publication itself is merely a technical contempt involving only a small likelihood of prejudice to the actual legal proceedings[44].

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[44] For a discussion of the House of Lords decision, see Arlidge & Eady, supra, note 15 at paras. 1-40; V.L. Wagner, "Human Rights: Government Interference with the Press" (1980) 21 Harv. Int'l L.J. 260; Borrie, supra, note 30; C.J. Miller, "Contempt of Court: The Sunday Times Case" [1975] Crim. L.R. 132; Borrie and Lowe, supra, note14 at 63.

The newspaper appealed to the European Commission on Human Rights on the basis that the injunction violated freedom of expression as guaranteed in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950. The matter was heard by the European Court of Human Rights in 1979. The European Court disapproved of the prejudgement principle used by the House of Lords to justify granting the injunction, and held that the injunction interfered with freedom of expression as guaranteed by the Convention.

The European Court went on to hold that this interference with freedom of expression could not be justified under Article 10(2) of the Convention, which permits those restrictions that are prescribed by law and which are necessary in a democratic society for maintaining the authority and impartiality of the judiciary. The Court arrived at this decision on the basis that the injunction was not justified by a pressing or compelling social need and could not be regarded as "necessary" within the meaning of Article 10(2), particularly since the article was moderate and presented more than one side of the evidence[45] .

While the immediate effect of this decision was to invalidate the injunction, its long-term significance lay in its clear indication that English common law would be required to meet the human rights protections set out in the European Convention on Human Rights. Thus, while the decision of the European Court did not invalidate contempt law in general as an unjustifiable restriction on freedom of speech[46], it indicated a willingness by the European Court of Human Rights to examine traditional English common law principles against the specific human rights provisions of the European Convention. As a result, this decision gave fresh impetus to the movement for reform of the traditional law of contempt of court, since it was recognized that there was a clear need to bring English law into line with the European Court's decision[47].

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[45] For a discussion of the European Court's decision, see Wagner, ibid.; W.M. Wong, "The Sunday Times Case: Freedom of Expression versus English Contempt-of-Court Law in the European Court of Human Rights" (1984-85) 17 N.Y.U.J. of Int'l L. & P. 35; P.J. Duffy, "The Sunday Times Case: Freedom of Expression, Contempt of Court and the European Convention on Human Rights" (1980-81) 5 Hum. R. Rev. 17.

5. The Contempt of Court Act 1981

The impetus for reform of contempt of court law culminated in the enactment of the Contempt of Court Act 1981 (U.K.)[48]. Indeed, this Act has been described as representing a shift away from protection of the administration of justice towards freedom of speech, which was brought about largely by the Sunday Times cases and which was foreshadowed by the Phillimore Report[49] .

(a) Restriction of the strict liability principle

The legislation amends and codifies many aspects of traditional English contempt of court law. In relation specifically to sub judice constructive contempt, s.2 of this legislation sets out the "strict liability rule". This rule provides that those who are responsible for prejudicial publications will be held strictly liable if the publications create a substantial risk that the course of justice in "active" proceedings will be seriously impeded or prejudiced[50]. "Strict liability" is defined as the rule of law whereby conduct which tends to interfere with the course of justice in particular legal proceedings may be treated as contempt of court regardless of intent to so interfere[51]. The times when proceedings are considered to be "active" are set out in Schedule 1.

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[46] Although some commentators have read this decision as attacking contempt of court law. According to F.A. Mann in "Contempt of Court in the House of Lords and the European Court of Human Rights" (1979) 95 L.Q.R. 348 at 349, for instance, this decision dealt the gravest blow to the fabric of English law that had ever yet occurred, and made a far-reaching inroad into the traditional law of contempt.

[47] Borrie and Lowe, supra, note 14 at 82.

[48] Supra, note 29.

[49] As per Lloyd, L.J., in A.G. v. Newspaper Publishing Plc., [1988] 1 Ch. 333 (C.A.). See also R. Stone, "'Intentional' Contempt and Press Freedom" (1988) 138 New L.J. 423; Borrie and Lowe, supra, note 14 at 85.

The legislation thus modifies traditional constructive contempt law by restricting the application of the strict liability rule to publications creating a substantial risk of serious prejudice to particular legal proceedings[52]. Publications which simply have the effect or the tendency of interfering with the legal proceedings will not be caught by this statutory strict liability rule, even though they would have been caught by the common law strict liability rule. Likewise, publications creating a less than substantial risk of serious prejudice, or a substantial risk of less than serious prejudice, to particular legal proceedings will also not be caught by this statutory strict liability rule.

In those situations where the publicity's effect is less than the serious risk of substantial prejudice required under the legislation, the contemner's liability for the publicity will depend upon whether the contemner intended to prejudice the proceedings. If intent cannot be established, the contemner will not be liable for the publication. If, however, it can be established that the contemner did intend to prejudice the proceedings, then by virtue of s.6(c) of the legislation, which provides that nothing in the Act restricts contempt liability in respect of conduct intended to impede or prejudice the administration of justice, the contemner will be held liable for the publication even if it presented only a very slight risk to the accused's trial or only had the tendency of prejudicing the trial[53].

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[50] It is interesting to note that the application of strict liability is more restricted under the Contempt of Court Act 1981 (U.K.) than it was under the proposal set out in the Phillimore Report. In the Report, the Committee recommended that strict liability be applicable to only those publications creating a risk of serious prejudice to the course of justice. The Act, however, has added a requirement that this risk of serious prejudice must be substantial, thus further limiting the type of publication which will be caught by the strict liability rule.

[51] s.1.

[52] All other types of contempt of court must now require the establishment of some degree of mens rea, at least where the contempt affects a particular legal proceeding. Of course, all types of contempt were strict liability offences at common law.

It is not clear, however, what degree of intent must be proved on the part of the contemner in order to have the contemner held liable : since liability for contempt of court has traditionally been strict, it has never before been necessary to determine the mens rea of constructive contempt of court[54]. The mens rea could thus range from actual intent, where the contemner publishes the material knowing that prejudice to the accused's trial is certain, to recklessness, where the contemner publishes the material knowing that prejudice is highly probable.

One commentator has suggested that in light of the Act's philosophy, the mens rea required of the contemner must be actual intent to cause certain prejudice to the accused's fair trial[55]. This was also the approach taken in Attorney-General v. Newspaper Publishing Plc.[56]. In this case, the court stated that s.6 saves the court's power to punish conduct which is specifically intended to impede or prejudice the administration of justice. The court went on to state that while this intent need not be expressly avowed or admitted, it can be inferred from all of the circumstances, including the foreseeability of the conduct's consequences. However, the intent does not include recklessness: this would breach the legislation's purpose, which is to shift the balance away from protection of the administration of justice towards freedom of speech. Thus, according to this decision, the mens rea required is the actual intent to interfere with the course of justice.

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[53] This saving provision in s.6 of the legislation also preserves the common law rule of strict liability in situations where, for reasons other than the degree of risk presented to the legal proceeding, the publication does not fall within the statutory strict liability rule. For instance, in A.G. v. News Group Newspapers Plc. [1989] 1 Q.B. 110, the publication posed a serious risk of prejudice to an accused's pending fair trial. However, because the trial was not "active" within the definition set out in the legislation, the publication was not caught by the strict liability rule. Nonetheless, the court held that because the publisher had intended to prejudice the accused's fair trial, the publication was caught by the saving provision in s.6, and the common law principle of strict liability applied.

[54] Borrie and Lowe, supra, note 14 at 87. In the words of Sir J. Donaldson, M.R., in A.G. v. Newspaper Publishing Plc., supra, note 49 at 373,"mens rea in the law of contempt is something of a minefield".

[55] Borrie and Lowe, ibid. at 87-88. But see Arlidge & Eady, supra, note 13 at para. 2-80, where the authors suggest that recklessness will suffice to establish this element of mens rea.

[56] Supra, note 49.

If this approach is correct, an accused will only be able to rely on s.6 of the legislation in the most blatant of situations where the contemner has deliberately set out to cause harm to the accused's trial. This was the situation in A.G. v. News Groups Newspapers Plc.[57], where the Attorney-General sought a contempt order against the owner and publisher of a newspaper which had published highly inflammatory articles concerning an accused doctor's trial for rape and which had arranged to provide financial help to the victim's mother if she brought a private prosecution against the accused doctor. The court held that this amounted to contempt, since these articles posed a real risk of prejudice to the accused's fair trial. The court also held that the articles, taken together with the financial support offered by the newspaper to the victim's mother, showed that the newspaper intended to prejudice the accused's fair trial by bringing to the attention of the paper's readers and potential jurors damaging information which would be inadmissible in criminal proceedings. Indeed, the newspaper's conduct showed not only actual intent but also recklessness of so serious a nature that it could only lead to the creation of a real risk of interference with the course of justice.

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[57] Supra, note 53.

As a result of this new legislation, then, an accused whose trial has been affected by pre-trial publicity will be more restricted in his or her ability to deal with that publicity through contempt proceedings, since the accused will be required to prove some degree of mens rea on the part of the contemnors in most circumstances. In other words, it is only where the publication creates a substantial risk of serious prejudice to the accused's pending legal proceeding that the accused will be able to rely on this statutory strict liability rule and will not have to establish the contemner's mens rea.

It should be noted, however, that there may be one way for an accused to avoid this restrictive application of the statutory strict liability rule. Since the legislation specifically states that this strict liability rule applies to publications which affect the proceedings in question, the accused may be able to rely on the common law principle of strict liability if he or she can show that the publication affected the administration of justice as a continuing process. Thus, even if the actual risk of harm to the administration of justice is only slight and even if the contemner did not intend to harm the administration of justice, the accused could argue that the contemner should be found strictly liable for the publication because it had the tendency of interfering with the administration of justice as an ongoing process[58] .

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[58] While recognizing the possibility of avoiding the statutory strict liability rule through characterizing the publicity as affecting the ongoing administration of justice, commentators have been critical of this approach. For instance, according to Borrie and Lowe, supra, note 14 at 87, such an approach would thwart Parliament's intention to restrict the application of strict liability and would fly in the face of the European Court's decision in Sunday Times.

(b) Statutory defences

The Act also modifies sub judice constructive contempt law by setting out several new defences. For instance, the legislation sets out a defence of innocent publication or distribution[59]. Further, the Act sets out a defence relating to the fair and accurate reporting of legal proceedings held in public where the reports are published contemporaneously and in good faith, although the Act does provide that the court may, where it appears necessary for avoiding a substantial risk of prejudice to the administration of justice, order the postponement of any report of the proceedings or of any part of the proceedings[60]. As well, the Act provides a defence whereby publication which is made as part of a good faith discussion of public affairs or other general public interest matters is not contempt if the risk of prejudice to particular legal proceedings is merely incidental to the discussion[61].

(c) Summary

In conclusion, the Contempt of Court Act 1981 (U.K.) made a number of significant changes to the law of sub judice constructive contempt. In particular, the legislation modified the principle of strict liability by restricting its application to only those publications which created a substantial risk of serious harm to a pending legal proceeding. As well, the legislation set out several defences available to a contemner who has published material prejudicing an accused's fair trial.

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[59] s. 3. This is very similar to the defence of innocent publication or distribution set out under s.11 of the Administration of Justice Act, 1960 (U.K.), as discussed above.

[60] s. 4. The legislation thus allows the reporting of evidence from preliminary hearings even if the publication endangers the accused's trial, but gives the court the ability to order the postponement of such reporting in circumstances where this is necessary to prevent prejudice to the administration of justice. Reporting of preliminary hearings in England was briefly discussed above at note 40, and is discussed in relation to Canada in Chapter 2, "Pre-Trial Proceedings Creating Pre-Trial Publicity: Prior Restraints, Coroners' Inquests, and Preliminary Inquiries".

[61] s. 5. In A.G. v. English, [1982] 2 All E.R. 903 (H.L.), the court held that a "merely incidental" risk of prejudice means no more than an incidental consequence of discussion expounding its main theme.

However, while the legislation is a genuine attempt to ameliorate the harshness of the traditional common law of contempt of court, it has nonetheless created further complexities in an already-complicated area of law. Indeed, this legislation has, in effect, created four classes of publications, each with its own set of rules and laws.

First, publications creating a substantial risk of serious prejudice to a pending legal proceeding will be governed by the strict liability rule set out in the legislation, so that the contemner will be liable for the publication regardless of the contemner's intent to prejudice the proceeding. Second, publications creating a less than substantial risk of serious prejudice to a pending legal proceeding in situations where the contemner had no intent to prejudice the proceeding will not be caught by either the common law or the statutory strict liability principle, and the contemner will not be liable for the publication. Third, publications creating a less than substantial risk of serious prejudice to a pending legal proceeding in situations where the contemner intended to prejudice the proceeding will be caught by s.6, and the contemner will be liable for the publication. Fourth, publications which are characterized as harming the administration of justice as a continuing process will be caught by the common law strict liability principle, regardless of whether the contemner intended to harm the administration of justice and regardless of the degree of harm posed by the publication to the administration of justice.

As a result, an accused's ability to use contempt of court proceedings in England as a means of dealing with pre-trial publicity will depend largely upon the type of publication in question and the class into which it falls. How effective contempt of court will be as a means of dealing with pre-trial publicity will be determined by the courts. It may well be that certain types of pre-trial publications which were considered sufficiently serious to warrant punishment prior to the enactment of this legislation will continue to be punished under this legislation as posing a substantial risk of serious harm to a pending legal proceeding[62]. Thus, pre-trial publications commenting on an accused's character, referring to an accused's past criminal record, publicizing an accused's alleged confession prior to its being admitted into evidence, or discussing the merits of the case may be found to be pose a substantial risk of serious harm to the accused's fair trial, and may thus fall within the statutory strict liability rule. This will depend, of course, upon the particular nature of the publication and upon the particular circumstances of the case.

For instance, in A.G. v. English[63], a newspaper published an article in support of a pro-life parliamentary candidate. The article, which asserted that handicapped babies were likely to be allowed to die of starvation or other means, was published in the same week as an accused's trial for the murder of a handicapped baby by starvation began. The court held that this publication posed a substantial risk that the course of justice in the accused's trial would be seriously prejudiced[64].

Likewise, in A.G. v. Times Newspapers Ltd.[65], five newspapers were prosecuted in respect of articles they had published concerning the background and character of Michael Fagan, the intruder into the Queen of England's bedroom who was facing several burglary and assault charges. The court had to decide whether these publications posed a substantial risk of serious prejudice to the accused's pending trial. The court held that two of the newspapers were not liable for contempt, since their articles created too remote a risk of prejudice to be considered "substantial". However, the other newspapers were held liable for contempt of court on the basis that their articles, which included assertions that the accused admitted to the burglary, which referred to the accused as a "rootless neurotic with no visible means of support", and which misrepresented the charges the accused was facing, did indeed create a substantial risk of serious prejudice to the accused's fair trial.

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[62] As is suggested by Borrie and Lowe, supra, note 14 at 118-119.

[63] Supra, note 61.

[64] However, the court dismissed the contempt application on the basis that while the article did fall within the statutory strict liability rule, the newspaper was entitled to rely on the defence set out in s.5 of the legislation, since the article was published as part of a discussion in good faith of a matter of public interest and where the risk of prejudice to the accused's trial was merely incidental to the discussion.

[65] Discussed in Borrie and Lowe, supra, note 14 at 121-122.

IV. DEFAMATION

A. INTRODUCTION

A second way in which an accused in England can deal with prejudicial pre-trial publicity is through the law of defamation. The English and Canadian laws of defamation are generally similar, and many of the same legal rules, definitions, and principles apply in England as in Canada[66] . For instance, defamation in England is considered to be a statement which lowers the plaintiff in the estimation of others; the law presumes the existence of malice, falsity and damage in the plaintiff's favour; and the law distinguishes between libel, which is written defamation, and slander, which is oral defamation. As well, the defences of justification, privilege, fair comment, and consent exist in both England and Canada.

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[66] For a thorough discussion of the English law of defamation, see Duncan and Neill on Defamation, 2nd ed.(London: Butterworth & Co. (Publishers) Ltd.,1983) (hereafter referred to as Duncan and Neill); Gatley on Libel and Slander, 8th ed. (London: Sweet & Maxwell Limited, 1981) (hereafter referred to as Gatley); P.F. Carter-Ruck and R. Walker., Carter-Ruck on Libel and Slander, 3rd ed. (London: Butterworth & Co. (Publishers) Ltd., 1985) (hereafter referred to as Carter-Ruck). For a discussion of Canadian defamation law, see Chapter 5, "Defamation".

While the Canadian law of defamation has been modified to some extent by defamation statutes passed in all the provinces and territories, the English law of defamation has also been modified, although these changes have been by way of various statutes passed by Parliament. For instance, the Libel Act, 1843 (U.K.)[67]; the Law of Libel Amendment Act, 1888 (U.K.)[68]; the Defamation Act, 1952 (U.K.)[69]; the Criminal Justice Act 1967 (U.K.)[70]; the Civil Evidence Act 1968 (U.K.)[71]; and the Rehabilitation of Offenders Act 1974 (U.K.)[72], have all modified the English defamation law of defamation.

B. DEFAMATION AND PRE-TRIAL PUBLICITY AFFECTING AN ACCUSED

1. Types of Publications Amounting to Defamation

Several types of pre-trial publicity may lower an accused's reputation in the community and may thus amount to actionable defamation in England. For instance, pre-trial publications imputing to an individual the commission of a criminal offence or of a conviction may be considered to be defamatory[73], since they tend to lower the individual in the estimation of others[74]. Likewise, pre-trial publications suggesting that an accused is guilty of a criminal offence may be found to be defamatory. By contrast, publications stating that an accused is suspected to be guilty or has been charged with a particular criminal offence may not be defamatory unless they suggest that there are reasonable grounds for suspecting the accused or convey an imputation of guilt[75]. Pre-trial publications negatively commenting on an accused's character or background in such a way as to lower the accused in the estimation of others may also be found to be defamatory.

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[67] 6 & 7 Vict. c.96. This act is also commonly referred to as Lord Campbell's Act.

[68] Supra, note 40.

[69] 15 & 16 Geo. 6 & 1 Eliz. 2, c.66.

[70] 1967, c.80.

[71] 1968, c. 64.

[72] 1974, c. 53.

[73] Gatley, supra, note 66 at para. 50. For instance, in Newstead v. London Express Newspaper Ltd., [1940] 1 K.B. 377, the plaintiff succeeded in a defamation action against the defendant newspaper when the paper published an account of a bigamy trial and described the accused in such a way so that the plaintiff could reasonably be taken to be the accused.

At one time, there was some question as to whether these types of pre-trial publicity are defamatory if they are based on information obtained at pre-trial proceedings such as preliminary hearings. Initially, the publication of reports of evidence admitted in open court at preliminary hearings was considered libelous[76]. This changed with the Law of Libel Amendment Act, 1888 (U.K.)[77], which made these publications privileged and thus non-libelous. This seemed to open the door to the reporting of highly prejudicial and defamatory evidence obtained from preliminary hearings. In light of the dangers raised by the reporting of such evidence to an accused's fair trial, however, the courts have placed various restrictions on the reporting of pre-trial court proceedings[78].

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[74] If these publications amount to libel, the defamed individual will not have to prove special damages, and the publications will be actionable per se. If these publications amount to slander, however, the individual will have to prove special damages unless the imputed crime is one which is punishable by imprisonment in addition to or instead of by a monetary fine: Gatley, ibid. at paras. 149-163; Hellwig v. Mitchell, [1910] 1 K.B. 609; Gray v. Jones, [1939] 1 All E.R. 798 (K.B.).

[75] Gatley, ibid. at para. 99.

[76] This was discussed above in relation to contempt of court: see note 40.

[77] Supra, note 40.

[78] For instance, s.8 of the Magistrates' Courts Act 1980 (U.K.), supra, note 40, limits what the media may publish in relation to committal hearings. Thus, the media can only publish information relating to such things as the identities of the parties and the witnesses, the offences with which the accused is charged; and any decision of the court to

2. Defences Available to a Media Defendant

Once the accused has established the basic elements of the defamation action, the onus then shifts in England, as it does in Canada, to the media defendant to establish any available defences. In England, the major common law defences available to a defendant include privilege, fair comment, consent, and justification[79]. Perhaps the most important of these defences for a media defendant is justification, whereby the media defendant asserts the truth of the defamatory statement.

Thus, where a defamatory statement imputes the commission of a criminal offence to the accused, the media defendant must, in order to rely on justification, establish that the accused did indeed commit the offence. It will not be enough for the defendant to prove that the accused was suspected of the offence or had a general reputation in the community for committing such offences[80].

If the accused was actually convicted for the offence which is imputed to him or her, the defendant can usually rely upon the fact of that conviction to establish justification: pursuant to s.13 of the Civil Evidence Act 1968 (U.K.)[81], proof of conviction for an offence is considered to be conclusive evidence of the commission of that offence[82]. However, proof of conviction

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commit or not to commit the accused for trial. See also the Criminal Justice Act 1987 (U.K.), 1987, c.38,which sets out restrictions on the reporting of applications for dismissal and of preparatory hearings.

[79] It should be noted that some of the statutes mentioned above, such as the Libel Act, 1843 (U.K.) supra, note 67 and the Defamation Act, 1952 (U.K.), supra, note 69, also set up specific statutory defences which may be available in some circumstances to a defendant in a defamation action.

[80] Gatley, supra, note 66 at para. 353.

[81] Supra, note 71.

[82] Prior to the enactment of this section of the Civil Evidence Act 1968 (U.K.), the fact of conviction for an offence was not necessarily conclusive evidence of the commission of that offence: Goody v. Odhams Press, Ltd., [1966] 3 All E.R. 369 (C.A.). This is still the case in Canada today.

and the defence of justification will not always succeed in situations where the media defendant has referred to an accused's past convictions. While at common law a plaintiff could not recover damages for the publication of an accurate account of his past convictions[83], this has been changed to some extent by the Rehabilitation of Offenders Act 1974 (U.K.)[84]. Pursuant to this legislation, a person who has become a rehabilitated person under this Act shall be treated for all purposes in law as a person who has not committed of, been charged with, or convicted for the offence which was the subject of the original conviction. Thus, a media defendant who publishes material relating to this original offence may not be able to rely upon the defence of justification if the plaintiff has become a "rehabilitated person", since this offence is deemed by the legislation to no longer exist.

3. Remedies Available to the Plaintiff

If the accused succeeds in the defamation action, he or she will be awarded damages. As in Canada, the damages that are awarded in England to a successful plaintiff in a defamation action may include compensatory damages as well as punitive or exemplary damages[85]. While compensatory damages will be the most usual basis for damage awards in defamation actions, punitive or exemplary damages may also be awarded in circumstances where the defendant's conduct was calculated to make a profit for the defendant[86]. Given that media defendants publish news for profit in their ordinary course of business, the courts have held that a media defendant will be held liable for exemplary damages only where the defendant has made a specific profit from the publication of a specific defamatory article or news item about the plaintiff[87].

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[83] Duncan and Neill, supra, note 66 at para. 11.14.

[84] Supra, note 72. This has not been changed in Canada, however.

[85] Broadway Approvals, Ltd. v. Odhams Press, Ltd., [1965] 2 All E.R. 523 (C.A.).

[86] Rookes v. Barnard, [1964] 1 All E.R. 367 (H.L.); Cassell & Co. v. Broome, [1972] 1 All E.R. 801 (H.L.).

As well, in some circumstances the accused may seek an injunction, either instead of or in conjunction with damages, to restrain further publication of the defamation. However, this will only granted in rare and exceptional circumstances[88].

4. Effectiveness of Defamation as a Means of Dealing with Pre-Trial Publicity

In summary, the law of defamation is another means available to an accused in England to protect his or her rights when those rights are threatened by pre-trial publicity. However, in England, as in Canada, the actual value of the law of defamation is in many cases more theoretical than real. Thus, while defamation law may appear to be a useful way of protecting an accused's interest in his or her reputation when that reputation is damaged by pre-trial publicity, in reality it is somewhat ineffective.

For instance, an accused who wishes to bring a defamation action against a media defendant must have had a previously good reputation which has been damaged as a result of the defamation. In many cases, however, an accused may have a less than good reputation. Such a plaintiff will be unlikely to succeed in a defamation action against the defendant, since the accused's reputation will be considered to have suffered no injury as a result of the defamation.

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[87] Broadway Approvals, Ltd. v. Odhams Press, Ltd., supra, note 85; Manson v. Associated Newspapers Ltd., [1965] 2 All E.R. 954 (Q.B.);

[88] Gatley, supra, note 66 at para. 1571.

Further, defamation proceedings create, by their very nature, further publicity surrounding the accused and the original defamatory statements, which may in fact worsen the injury already done to the accused's reputation. As well, defamation proceedings are very expensive and time-consuming. As Gatley sums up these difficulties with the law of defamation,

> The only person who can contemplate with equanimity bringing an action for libel and slander is one with ample means, whose reputation is unblemished and whose complaint is of a damaging and clear public misstatement of a specific fact.[89]

C. CRIMINAL LIBEL

While the publication of defamatory material is usually the subject of civil defamation proceedings brought by the plaintiff against the defendant to obtain compensation for damage to the plaintiff's reputation, the publication of defamatory material can also be, in some circumstances, a criminal offence at common law[90] . In particular, a prosecution for criminal libel may be appropriate where the libel is sufficiently serious and grave to require the Crown's intervention in the public interest[91]. However, prosecutions for this common law crime are relatively uncommon[92] .

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[89] Ibid. at para. 882.

[90] Unlike Canada, the crime of defamatory libel in England has not, for the most part, been codified. However, some English statutes do affect this common law crime. For instance, s.8 of the Law of Libel Amendment Act, 1888 (U.K.), supra, note 40, prohibits the commencement of a criminal prosecution for libel against the proprietor, publisher, or editor of a newspaper without the order of a judge at chambers first being obtained. See also the Libel Act, 1843 (U.K.), supra, note 67, which sets out a modified defence of justification to a charge of criminal libel.

[91] Gleaves v. Deakin, [1979] 2 All E.R. 497 (H.L.); Goldsmith v. Pressdram Ltd., [1977] 2 All E.R. 557 (Q.B.); Desmond v. Thorne , [1982] 3 All E.R. 268 (Q.B.).

[92] Duncan and Neill, supra, note 66 at para. 20.02. For a detailed discussion of the law of criminal libel, see Law Commission, Working Paper 84: Criminal Libel (London, 1982).

V. PROCEDURAL SAFEGUARDS

A. INTRODUCTION

In England, relatively little importance has been placed on the use of procedural safeguards to protect an accused's right to a fair trial[93]. Indeed, English courts have relied almost exclusively upon contempt of court proceedings as being a satisfactory means of dealing with the problems posed by pre-trial publicity. Thus, those procedural safeguards that exist to ensure a fair trial once pre-trial publicity has reached the public are rarely used by English courts in practice. Further, those safeguards that are indeed used by English courts are used on the basis of untested and unquestioned assumptions that they will be effective means of guaranteeing an accused's right to a fair trial. These procedural safeguards are considered below.

B. SAFEGUARDS RELATING TO THE CONDUCT OF THE TRIAL

In England, change of a trial's venue is possible pursuant to s.76 of the Supreme Court Act 1981 (U.K.)[94]. According to this legislation, a change of venue can be requested by either the accused or the prosecutor upon application to the Crown Court. While the normal rule is that the trial will be held before the court of the area in which the offence was committed[95], the court has the discretion to alter the place of the trial wherever it is considered expedient to do so in the ends of justice, such as where there is excessive delay at the original venue or where a fair trial can not be had at the original venue[96]. In practice, however, a trial's venue appears to be rarely changed due to pre-trial publicity. It has been suggested that this reluctance to change a trial's venue, even in the face of extensive pre-trial publicity, is based on a judicial belief that any prejudice caused to the trial as a result of the pre-trial publicity will die away after a short time[97].

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[93] For a discussion of the procedural safeguards that exist in Canada, see Chapter 4, "Procedural Safeguards".

[94] 1981, c.54.

[95] As discussed in S. Mitchell & P.J. Richardson, eds., Archbold's Pleading, Evidence and Practice in Criminal Cases, 43rd ed. (London: Sweet & Maxwell Limited, 1988) at para. 2-20 (hereafter referred to as Archbold). See also L.G. Carvell & E. S. Green, Criminal Law and Procedure (London: Sweet & Maxwell, 1970) at 221.

A second procedural safeguard available to an accused is severance, whereby an accused's trial can be severed from that of a co-accused in situations where that co-accused has been the subject of extensive pre-trial publicity. However, a strong common-law presumption exists that accused who are jointly indicted should be jointly tried[98]. As a result, severance can only be ordered in exceptional circumstances[99], such as where it is clearly required in the interests of justice. Severance may thus be ordered in circumstances where evidence which is admissible against one accused would not be admissible against the co-accused, and where an essential part of one accused's defence is an attack on a co-accused[100]. Severance could also be ordered, at least in theory, in cases where one accused's right to a fair trial is affected by pre-trial publicity surrounding a co-accused. However, there appear to be no reported English cases in which this has actually been done.

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[96] R. Arguile, Criminal Procedure (London: Butterworth & Co. (Publishers) Ltd., 1969) at 133.

[97] Ibid. As well, changing the venue in a highly publicized case may be ineffective on a practical level because of England's relatively small size and the resulting difficulty in finding a location unaffected by the pre-trial publicity.

[98] As stated in the leading case of Re Grondkowski and Malinowski (1946), 31 Cr. App. R. 116 (C.A.).

[99] R. v. Moghal (1977), 65 Cr. App. R. 56 (C.A.).

[100] Archbold, supra, note 95 at para. 1-73; Carvell & Green, supra, note 95 at 240; C. Hampton, Criminal Procedure (London: Sweet & Maxwell, 1982) at 168.

A third procedural safeguard relating to the trial's conduct is the court's ability to declare a mistrial. Thus, a trial judge has the ability to declare a mistrial at any stage of the trial, discharge the jury, swear in a new jury, and restart the case. However, the court's use of this safeguard is restricted in practice.

Fourth, an accused can seek to have his or her conviction set aside on appeal. However, this is another safeguard which is rarely used in practice. For instance, the fact that the trial proceeds in circumstances where the jury might properly have been discharged but was not in fact discharged is not in itself a ground for setting aside the accused's conviction on appeal[101].

Further, many courts have held that the trial judge's failure to declare a mistrial in the face of prejudicial pre-trial publicity does not in itself warrant overturning the accused's conviction on appeal[102] . As a result, an accused whose trial has been affected by prejudicial pre-trial publicity may be unable to have his or her conviction overturned on appeal[103] .

For instance, in R. v. Savundranayagan[104] , an accused was interviewed on television, shortly before his arrest, by a skilled interviewer whose aim was to establish the accused's guilt before an audience of millions. The interview was also reprinted in a Sunday newspaper. The accused was convicted of several fraud charges. On appeal,he argued that his conviction should be quashed because, inter alia, of this prejudicial pre-trial publicity. The appeal court refused to overturn his conviction and dismissed his appeal on the basis that while the publicity was regrettable, it was not a sufficiently strong ground to warrant quashing the conviction. The court reached this decision on the basis that he had voluntarily agreed to the interview; that there was no real risk the jury had been influenced by the publicity since the trial took place some 11 months after the publicity and since the trial judge had instructed the jury to ignore extraneous information; and that the case for the Crown was so overwhelming that no jury could have returned any different verdict.

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[101] Halsbury's, supra, note 17, Vol. 11(2), para. 1022-1023 .

[102] See, for instance, R. v. Armstrong, [1951] 2 All E. R. 219 (C.A.), where the court stated that merely because a newspaper discloses an accused's previous convictions does not mean that the conviction must be quashed; R. v. Dubarry (1976), 64 Cr. App. R. 7 (C.A.); R. v. Sanderson (1915), 31 T.L.R. 446 (C.A.); R. v. Hood (1968), 52 Cr. App. R. 265 (C.A.). However, in at least one other case, the pre-trial publication of the accused's criminal record resulted in the quashing of his conviction: R. v. Dyson (1943), 169 L.T. 237 (C.A.).

[103] By contrast, the court's power to reverse an accused's conviction on appeal and to order a new trial on the basis that prejudicial publicity infringed the accused's right to a fair trial is one of the most significant procedural safeguards relied upon by courts in the United States: see Chapter 6, "The American Experience".

[104] [1968] 3 All E. R. 439 (C.A.).

C. SAFEGUARDS RELATING TO THE TRIERS OF FACT

In addition to procedural safeguards relating to the conduct of the trial itself, English courts have made some limited use of procedural safeguards relating to the triers of fact. Perhaps the most significant of these safeguards is the ability of the accused and the Crown to challenge an unlimited number of jurors for cause[105]. Thus, an accused can challenge a potential juror where that juror is somehow disqualified from serving on the jury; where the juror has been convicted of a criminal offence; where the juror is for some reason not impartial; or where there are reasonable grounds for suspicion that the juror will act under some prejudice or undue influence[106] .

However, an accused's ability to successfully challenge a juror on the basis of lack of impartiality is limited by several factors. For instance, it is well-established in English law that counsel cannot question a juror prior to challenging the juror for cause. Instead, counsel must give particulars and lay a foundation, based on extrinsic evidence, for the challenge before being able to question the prospective juror[107]. As a result, an accused will only be able to successfully challenge a juror for lack of impartiality due to pre-trial publicity in the most blatant of circumstances where the accused possesses extrinsic evidence clearly showing the juror's lack of impartiality[108]. In the words of one commentator[109], "the right to exercise challenges for cause...is a right in name only in England because counsel is barred from asking any questions at all to prospective jurors".[110]

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[105] Juries Act 1974 (U.K.), c. 23, s. 12. The Crown in England also has the right, as it does in Canada, to stand-by prospective jurors.

[106] Carvell & Green, supra, note 95 at 257; Hampton, supra, note 100 at 204; Archbold, supra, note 95 at para. 4-149 - 4-161.

An accused's ability to successfully challenge a prospective juror based on the juror's lack of impartiality due to prejudicial pre-trial publicity is also limited by the fact that the courts traditionally have taken an optimistic view of the jurors' ability to remain impartial in the light of such publicity. In the words of Lawton, J.,

> I have enough confidence in my fellow-countrymen to think that they have got newspapers sized up just as they have got other public institutions sized up, and they are capable in normal circumstances of looking at a matter fairly and

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[107] This is in sharp contrast to the American system, where counsel is allowed to ask the prospective juror a wide variety of questions before deciding whether to challenge the juror for lack of impartiality: see Chapter 6, "The American Experience".

[108] In R. v. Kray(1969), 53 Cr. App. R. 412 (C.A.), the court held that counsel had established this foundation for challenging the juror by producing a large number of newspapers containing prejudicial pre-trial publicity and by producing some evidence as to the publicity in relation to television and radio newscasts.

[109] M.H. Graham, Tightening the Reins of Justice of America: A Comparative Analysis of the Criminal Jury Trial in England and the United States (London: Greenwood Press, 1983) at 71.

[110] It should be noted that one of the few exceptions to this general rule that counsel can not inquire into the jurors' backgrounds, occupations, or views prior to laying a foundation of fact for a challenge is jury-vetting. In some circumstances, the prosecuting authorities are entitled to check the prospective jurors' backgrounds for criminal convictions. For guidelines as to when jury-vetting is appropriate, see Attorney-General's Guidelines, set out at (1989), 88 Cr. App. R. 123. Also see R. v. Crown Court, Ex parte Brownlow, [1980] 2 All E.R. 445 (C.A.); R. v. Mason (1980), 71 Cr. App. R. 157 (C.A.).

> without prejudice even though they have to disregard what they may have read in a newspaper.[111]

Thus, the courts have held that a juror's knowledge of an accused's character or convictions will not automatically result in the juror from being disqualified from sitting on the jury[112] .

Further, an accused's ability to successfully challenge a juror for lack of impartiality is restricted by the fact that in England, neither the accused nor the Crown has a right of peremptory challenge[113] . Thus, even if an accused believes a prospective juror has been influenced by prejudicial pre-trial publicity, the accused cannot have that prospective juror excluded from the jury unless the accused can prove on the basis of extrinsic, objective evidence that the prospective juror is biased. Given the difficulty of establishing this proof in most circumstances, an accused is severely hampered in dealing with prospective jurors who have been subjected to pre-trial publicity.

Other procedural safeguards relating to the conduct of the triers of fact and which are relied upon to some extent by English courts include the juror's oath to faithfully try the accused and to give a true verdict according to the evidence[114] , and the instructions given by the trial judge to the jury to disregard any extraneous information and to try the accused solely on the basis of the evidence admitted in open court[115] . However, while these procedural safeguards are used, at least to some extent, by English courts as a means of ensuring an accused's fair trial, there appears to have been no objective assessment of the actual efficacy of these safeguards in dealing with pre-trial publicity and in ensuring an accused's right to a fair trial.

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[111] R. v. Kray, supra, note 108 at 414. See also A.G. v. British Broadcasting Corp., [1979] 3 All E.R. 45 (C.A.), aff'g [1978] 2 All E.R. 731 (Q.B.), where Everleigh, L.J. stated that it is very hard to envisage a case where a court, whether composed of lawyers or laymen, would be influenced by publicity.

[112] Archbold, supra, note 95 at para. 4-169.

[113] The right of peremptory challenge was recently abolished in the Criminal Justice Act 1988 (U.K.), 1988, c.33, s.118.

[114] As set out in Practice Note, [1984] 3 All E.R. 528. See also Archbold, supra, note 95 at para. 4-165.

[115] Indeed, in R. v. Savundranayagan, supra, note 104, one of the factors leading the court to find that the jury had not been influenced by prejudicial pre-trial publicity was that the trial judge had given a strong warning to the jurors, both at the start of the trial and in

VI. CONCLUSION

In both England and the United States, pre-trial publicity has created significant problems for the fairness of an accused's trial. Indeed, the English media appear to be no less willing to make a profit from the publication of sensational information concerning an accused and his or her trial than are the American media.

The dangers of pre-trial publicity have long been recognized by English courts and commentators. The English courts have chosen to deal with these dangers by giving priority to an accused's right to a fair trial before an impartial tribunal over the media's rights. In the words of Watkins, L.J.,

> The need for a free press is axiomatic, but the press cannot be allowed to charge about like a wild unbridled horse. It has, to a necessary degree, in the public interest, to be curbed. The curb is in no circumstances more necessary than when the principle that every man accused of crime shall have a fair trial is at stake.[116]

In order to uphold an accused's right to a fair trial over the media's rights, English courts rely heavily, if not exclusively, upon contempt of court proceedings as a means of ensuring an accused's right to a fair trial and as a means of preventing the publication of pre-trial publicity. As a result of this

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summing up, that they must disregard information they might have heard, read, or seen outside the courtroom.

[116] A.G. v. News Groups Newspapers Plc., supra, note 53 at 134.

reliance upon contempt of court, the English media are punished for the prejudicial and harmful material they publish.

However, to rely solely upon the prevention of the problems created by pre-trial publicity is to ignore the other half of the equation: the need to cure the problems created by pre-trial publicity when prevention has failed. By relying almost exclusively on contempt of court proceedings as the sole way of dealing with pre-trial publicity, the English courts have ignored the fact that such publicity can do much harm to an accused's trial even if those responsible for the publicity have been punished through contempt proceedings. In other words, the English approach of dealing with pre-trial publicity by trying to prevent it through contempt of court proceedings and by punishing those responsible for the publicity ignores the very real ongoing effects of the publicity once it has reached the public. The failure of the English courts to rely upon the procedural safeguards as a somewhat imperfect means of curing the problems created by pre-trial publicity can no more be excused than can the failure of the American courts to rely on contempt of court proceedings and prior restraints as somewhat imperfect means of preventing the problems created by pre-trial publicity.

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CHAPTER 8

GENERAL DISCUSSION AND CONCLUSIONS

I. GENERAL DISCUSSION

Pre-trial publicity poses a significant risk to the fairness and impartiality of an accused's criminal trial. The Canadian approach to the problems created by pre-trial publicity has been to utilize a number of legal responses to deal with such publicity and its effects. These legal responses include preventing the publication of certain types of information through the use of prior restraints; discouraging the publication of prejudicial pre-trial publicity by using contempt of court proceedings to punish those responsible for such publicity; neutralizing the effects of pre-trial publicity once it has reached the public through the use of procedural safeguards set out in the Criminal Code; and compensating an accused for the injury done to his or her reputation by pre-trial publicity through the use of defamation proceedings.

These legal responses to the problems posed by pre-trial publicity are founded on the philosophy that when freedom of expression and the right to a fair trial come into conflict, there must be a balancing of the two, and one must ultimately prevail over the other. In the words of one Canadian commentator, "in a less than utopian society, trials cannot be absolutely fair if reporting of these trials is to be absolutely free. Free press and fair trial cannot coexist as absolutes"[1].

The Canadian philosophical approach to this conflict between freedom of expression and the right to a fair trial has been to strike the balance between these two concepts in favor of the right to a fair trial. As one commentator puts it,

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[1] W.H. Kesterton, The Law and the Press in Canada (Toronto: McLelland and Stewart Limited, 1976) at 18.

> What is needed is a careful and acceptable balancing of all the competing interests involved at each stage of the criminal process and, while maintaining the fairness of the trial of the accused must be paramount in all cases, there are perfectly sound reasons why what is unthinkingly called the public right to know must sometimes yield to an overriding interest in not letting them know[2].

Thus, the legal responses that are available to deal with pre-trial publicity are intended to give precedence to the accused's right to a fair trial over the media's freedom of expression. As a result, several of these legal responses, such as contempt of court proceedings and prior restraints, infringe to some extent upon freedom of expression. These infringements have been justified, both prior to and since the enactment of the Charter, on the basis that the right to a fair trial takes priority over this freedom.

It is submitted that this philosophical approach to the conflict between the right to a fair trial and freedom of expression is correct. An accused's right to a fair trial can be destroyed by unbridled and uncontrolled pre-trial publicity. Indeed, the impact of such publicity may be so devastating and so indelible as to be render useless the neutralizing effects of the procedural safeguards which are set out in the Code[3]. This destruction of an accused's right to a fair trial in the name of freedom of expression is difficult to accept in a civilized society which values the right to a fair trial as one of its fundamental rights and which considers this right to be one of the foundations of its system of justice.

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[2] A.W. Mewett, "Publicity and the Criminal Process" (1988-89) 31 Cr. L.Q. 385 at 387.

[3] Indeed, the usefulness of these procedural safeguards, which are considered by many commentators to be an adequate means of protecting the right to a fair trial without infringing upon freedom of expression, may in any event be more illusory than real.

While upholding freedom of expression over the right to a fair trial would cause grave, if not irreparable, harm to an accused's right to a fair trial, the converse is not true. In other words, striking the balance in favor of the right to a fair trial will generally cause only minor harm to freedom of expression. Any harm that is caused to freedom of expression can be limited by carefully examining the legal responses available to deal with pre-trial publicity to ensure that they impair this freedom to the least extent possible. Thus, a comparison of the possible harms caused by upholding one right over another lends support to the conclusion that the right to a fair trial should be given precedence over freedom of expression, since the damage that can be done to the right to a fair trial by upholding freedom of expression is much greater than the damage that can be done to freedom of expression by upholding the right to a fair trial.

This philosophical approach to the conflict between freedom of expression and the right to a fair trial should not change significantly as a result of the Charter. While the enactment of the Charter will require courts to balance these rights and freedoms in a more thorough manner and to take into account the different societal and public values that freedom of expression and the right to a fair trial each serve, this balancing process may well lead to the same results as did the balancing process prior to the Charter. Although the Charter has declared freedom of expression to be a fundamental freedom and has given it constitutional status, this does not somehow change or transform the dangers that pre-trial publicity poses to an accused's fair trial. Thus, the balancing of these two rights and freedoms should continue to be struck in the same way as it was prior to the enactment of the Charter. As a result, it is not surprising that Canadian courts, even after the enactment of the Charter, have continued to uphold the right to a fair trial over freedom of expression in cases where pre-trial publicity threatens an accused's fair trial.

The Canadian philosophical approach to the problems created by pre-trial publicity has been implemented through the legal responses that exist to prevent the pre-trial publication of prejudicial information, such as prior restraints, and that exist to deal with such information once it has been published, such as contempt of court proceedings, procedural safeguards, and defamation proceedings. The availability of this broad range of legal responses is a well-balanced approach to the problems created by pre-trial publicity and its effects on an accused's fair trial. It is clear that neither measures intended to prevent the publication of prejudicial information nor measures intended to cure the effects of such information once it has been published are adequate standing alone to deal with the effects of pre-trial publicity.

This is clearly illustrated by the American and the English experiences. In the United States, freedom of expression has been given precedence over an accused's right to a fair trial. Thus, the publication of pre-trial publicity can not be deferred or prevented, and the media cannot be punished or held accountable for what it publishes, since such measures are considered to infringe upon freedom of expression. This has created a situation where the press has an almost unlimited power to publish what it wishes without regards for the rights of an accused. As a result, an accused whose trial has been damaged by pre-trial publicity has little choice but to rely on procedural safeguards intended to counter the effects of the publicity. In light of the inadequacies of some of these safeguards, however, the accused's right to a fair trial is a right in name only.

The need to rely on measures both to prevent the publication and to deal with the effects of pre-trial publicity once it has been published is also illustrated by the English experience. In England, as in Canada, the accused's right to a fair trial has been given precedence over the right to a fair trial. However, English courts rely almost exclusively upon contempt of court proceedings to punish those responsible for the publication of pre-trial publicity. The courts rarely deal with the effects of such publicity through the use of procedural safeguards. This approach assumes that the accused's right to a fair trial can be protected simply by punishing the person responsible for the publicity, and ignores the very real, prejudicial effects of pre-trial publicity once it has reached the general public, Thus, the accused's right to a fair trial is again a right in name only.

Although the Canadian approach to the problems created by pre-trial publicity is more balanced and more effective than the American and the English approaches, it is by no means perfect. Indeed, although the use of prior restraints, contempt of courts proceedings, procedural safeguards, and defamation proceedings are all important ways of dealing with pre-trial publicity, they are in need of change and reform.

II. PROPOSALS FOR REFORM

A. INTRODUCTION

The legal responses that currently exist to deal with the problems created by pre-trial publicity are unsatisfactory in several respects. These legal responses could be modified and reformed to make them more effective means of dealing with pre-trial publicity and to reduce their infringement upon freedom of expression. Proposed reforms are set out below.

As well, the implementation of a variety of non-legal responses could also provide effective ways of dealing with pre-trial publicity and its effects upon an accused's rights. For instance, enlarging and broadening the role of press councils, establishing a professional code for the media, creating voluntary press-bar committees, and establishing rules of professional conduct for the legal profession are all additional non-legal responses to the problems created by pre-trial publicity. These are also set out below.

B. PRIOR RESTRAINTS

The use of prior restraints is an important means of protecting an accused's right to a fair trial by preventing or delaying the pre-trial publication of prejudicial information. While prior restraints help to protect the right to a fair trial, however, they also infringe to some extent upon freedom of expression[4]. Thus, while prior restraints should be retained as a means of dealing with such pre-trial publicity, they must be changed in several ways to make them more effective means of dealing with pre-trial publicity and to ensure that they infringe upon freedom of expression as little as possible.

In relation to direct prior restraints such as publication bans, the laws governing the use of these prior restraints should be set out in one comprehensive part of the Criminal Code. This would allow those prior restraints which are already set out under various scattered provisions of the Code, such as prior restraints arising in relation to bail hearings, sexual offence cases, and preliminary inquiries, to be made consistent with each other and to be governed by similar guidelines and requirements. This would also allow those prior restraints which arise from the court's inherent common-law power to be brought under and to be regulated by the Code. For instance, publication bans on information arising from change of venue applications and from fitness to stand trial hearings which are currently not set out in the Code but which instead arise under this common-law power, would be set out in this new part of the Code.

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[4] The actual degree to which prior restraints infringe upon freedom of expression is debatable. While they do delay the publication of certain types of information arising from various pre-trial proceedings, they do not appear to significantly impair the broader societal and public goals sought to be achieved by freedom of expression.

The Code guidelines should make certain types of publication bans mandatory. For instance, a ban on the pre-trial publication of very harmful information such as an accused's criminal record or confession should be made mandatory. However, bans on the pre-trial publication of other types of less harmful information should be discretionary.

As well, the Code guidelines governing direct prior restraints should ensure that these prior restraints infringe as little as possible upon freedom of expression. This could be achieved by narrowly limiting the scope of publication bans so that they would cover only that information specifically set out in the ban and would last for only a definite and limited time period.

While direct prior restraints should thus be retained and modified, there is far less justification for retaining indirect prior restraints such as closure orders. Indeed, it is difficult to imagine a situation where pre-trial publicity would be so harmful to an accused's subsequent fair trial that the only way to deal with it would be by closing the courtroom to the public. In the vast majority of cases, such harmful information could be adequately dealt with through bans on the publication of that information. Thus, closure orders should be resorted to only in the most compelling of circumstances, where the party seeking the order has clearly and unequivocally demonstrated that publication bans as well as the procedural safeguards would be ineffective to guarantee the accused's right to a fair trial in the face of pre-trial publicity.

While the above discussion has focussed on prior restraints arising from various pre-trial criminal proceedings, it must not be forgotten that other types of pre-trial proceedings can also threaten an accused's right to a fair trial. In particular, information which arises from coroners' inquests can endanger the right to a fair trial. However, provincial legislation governing coroners' inquests generally does not allow for the imposition of publication bans on information arising from the inquest.

In order to protect the accused's right to a fair trial when that right is threatened by information arising from an inquest, provincial legislation governing coroners' inquests should be amended so that a person who testifies as a witness before an inquest and who is likely to be subsequently charged with a criminal offence could request a publication ban on information arising from the inquest. The judge or coroner presiding over the inquest would have the discretion as to whether or not to make the order, and would exercise this discretion according to the nature of the information under consideration[5].

This publication ban would last for a specific time period running from the time of the inquest until the accused's subsequent criminal trial has ended or the accused has been discharged at the preliminary inquiry. If criminal proceedings do not follow the inquest, provision could be made for allowing the press to apply to have the ban removed once a specified time period, such as six months or a year, has passed after the end of the inquest[6].

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[5] For instance, some types of information, such as a witness's confession or criminal record, would clearly require the making of a publication ban.

[6] This type of publication ban should also be available at other public proceedings, such as Royal Commissions and public inquiries, where the legislation governing such proceedings does not make provision for a publication ban.

C. CONTEMPT OF COURT PROCEEDINGS

Contempt of court proceedings, which deter the publication of pre-trial publicity by punishing those responsible for the publicity, are a second important way of protecting an accused's right to a fair trial in the face of pre-trial publicity. Indeed, the importance of these proceedings as a means of guaranteeing a fair trial is obvious when one examines the situation in the United States, where contempt of court proceedings are not used to protect the right to a fair trial. As a result of this judicial reluctance to hold the media responsible for publications which infringe an accused's right to a fair trial, the American media is able to ignore the accused's right to a fair trial.

Contempt of court proceedings may arguably infringe upon freedom of expression, since they punish the media for its improper exercise of this freedom. However, this is not an intolerable intrusion upon freedom of expression, particularly in light of the compelling need to ensure that an accused is fairly tried on the basis of evidence which is properly given at court and not on the basis of extraneous information which is presented by the media prior to the trial and which is not subject to any of the usual safeguards governing the admissibility of evidence.

Although contempt of court proceedings may not impair freedom of expression in any real sense, however, they are unfair in a variety of ways to a media defendant charged with contempt. The law governing contempt of court, and in particular sub judice contempt of court, should be modified to deal with some of the more troubling aspects of contempt of court.

For instance, one troubling area of contempt of court law is the lack of a mens rea requirement: a contemner can be found guilty of sub judice contempt of court even if the contemner never intended to cause any harm to an accused's pending criminal trial and even if the contemner had not known that criminal proceedings were pending. This lack of mens rea should be dealt with in two ways. First, contempt of court law should be modified to include a limited defence of innocent publication, whereby those responsible for the publication of contemptuous material would not be held liable for contempt if they could show that they did not know that criminal proceedings were pending and that they had taken all reasonable steps to find out. Second, since those who distribute contemptuous material can also be found liable without any showing of mens rea on their part, contempt of court law should be modified to include a limited defence of innocent publication, whereby those disseminate contemptuous material would not be held liable for contempt if they could show that they had taken reasonable care to determine if the material was contemptuous and that they had no reason to believe that it was contemptuous[7].

Another troubling area of contempt of court concerns the use of the summary procedure to bring and to prosecute contempt charges against alleged contemnors. Given that the traditional summary procedure does not include many of the safeguards normally available to persons accused of a criminal offence, the use of the summary procedure threatens the contemner's own right to a fair and proper trial. Further, the safeguards that are available in practice to an accused contemner will depend upon the form of "summary procedure" being utilized by the judge, for there is no one prescribed summary procedure regularly followed by the courts. Since there is no compelling reason why the summary procedure should be used instead of the regular procedure by indictment, the summary procedure should be abolished and replaced by the regular procedure by indictment.

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[7] These proposed defences are very similar to those that currently exist in England under the Contempt of Court Act 1981 (U.K.), as discussed in Chapter 7, "The English Experience". While these defences would modify the current law to some extent, they would not import a full mens rea requirement into contempt of court law. Such a full mens rea requirement would render this area of law useless as an effective means of dealing with pre-trial publicity, since relatively few contemptuous publications are made with a deliberate intent to prejudice an accused's right to a fair trial. The lack of a full mens rea requirement does not impose an intolerable burden upon the media. Indeed, in order to avoid contempt liability, media organizations must simply take greater care in [illegible] more alert about the content of what they publish concerning pending criminal proceedings.

The lack of codification of many aspects of contempt law is a third area of concern. Contempt of court is largely a common-law offence. As a result, many important aspects of contempt of court law are undefined and vague. These should be codified and made part of the Criminal Code. For instance, Code provisions should set out and define the various contempt of court offences; should set out the specific procedure to be used for trying an alleged contemner; and should set out the range of penalties that can be imposed for a contempt conviction[8]. Any codification that is made of contempt of court law, however, should be comprehensive, coherent, and well-structured[9].

D. PROCEDURAL SAFEGUARDS

The use of procedural safeguards is one of the most relied-upon means of dealing with pre-trial publicity and its effects upon an accused's right to a fair trial. However, while courts and commentators base such reliance on the assumption that these safeguards are effective means of countering the effects of pre-trial publicity, the efficacy of these safeguards may be more theoretical than real. Significant changes are needed to these safeguards in order to make them truly effective means of protecting an accused's right to a fair trial in the face of pre-trial publicity.

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[8] In relation to sub judice contempt in particular, it is suggested that this be made a hybrid offence punishable either by a fine or by a maximum imprisonment of two years.

[9] Careful and thoughtful codification is necessary in order to avoid the English experience, where codification of many aspects of contempt of court law has left intact large parts of the common law and has created further complexities in an already-complicated area of the law: see Chapter 7, "The English Experience", in relation to contempt of court.

One of the most compelling changes that must be made to this area of the law is to encourage the empirical testing of this assumption that safeguards are an effective means of guaranteeing the right to a fair trial. Few Canadian studies have to date studied the actual efficacy of these procedural safeguards. Those studies that have been made in Canada are not encouraging, and have tended to show that safeguards such as the trial judge's instructions to the jurors are ineffective in practice. Indeed, without further study and empirical analysis of the efficacy of these safeguards, blind assumptions that they are effective should no longer be tolerated[10].

Even if studies show that safeguards are effective ways of protecting the right to a fair trial, they are not a panacea for the problems created by pre-trial publicity. Indeed, many of these safeguards should be modified so that they can better respond to the problems posed by pre-trial publicity. For instance, consideration should be given to changing the current rules governing changes of venue, so that a trial can, in circumstances of province-wide publicity, be changed to a location in a different province which has been less affected by the publicity. Likewise, the rules governing challenges to potential jurors for lack of impartiality should be changed to permit counsel to ask a broader range of questions designed to determine whether a potential juror has been affected by pre-trial publicity[11], and should be codified to set out the exact procedure to be following in making the challenge and to regulate the trial judge's exercise of his or her discretion during the challenge.

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[10] Social science data can also be useful in determining when pre-trial publicity is such as to require a change of venue and in determining the questions that should be asked of prospective jurors during the challenge process in order to assess their degree of partiality. Canadian courts should be encouraged to make use of such data where it exists and is credible.

[11] Although the range of permitted questions should not be so broad as to allow counsel to go on a "fishing expedition", as is currently the case in the United States.

Of course, some of the problems that exist with procedural safeguards may be incurable. For instance, given the pervasiveness and extent of modern mass media communications, it may be impossible to change a sensational trial's venue from a location which has been prejudiced by pre-trial publicity to a location which has been unaffected by such publicity.

E. DEFAMATION PROCEEDINGS

While defamation proceedings serve a different purpose than do the other legal responses to pre-trial publicity, in that they uphold an accused's interest in his or her reputation when it is damaged by pre-trial publicity rather than ensuring the accused's right to a fair trial, defamation proceedings are nonetheless an important way of protecting the accused's rights in the face of prejudicial pre-trial publicity. However, a number of changes should be made to this area of law in order to better protect the accused's interest in his or her reputation.

For instance, the current law governing the publication of a person's prior criminal record should be reformed so that the publication of a person's prior criminal record would, in certain circumstances, be considered defamatory. At present, the defence of justification is an absolute defence, so that a person who has a prior criminal record cannot obtain compensation for the publication of that criminal record. Thus, a person who is charged with a criminal offence and whose criminal record is publicized will not be able to obtain compensation, even if the record is many years old and is completely unrelated to the offence with which the person is currently charged[12]. Consideration should be given to changing the law of defamation to allow for a person to recover compensation for the publication of his or her criminal record in some circumstances[13].

Likewise, because the law of defamation is very technical and complicated, defamation proceedings can be very protracted and expensive, and can thus be out of the reach of many plaintiffs. Alternative forms of dispute resolution, such as mediation and arbitration, should be encouraged so that persons whose reputations have been damaged by defamatory pre-trial publicity can obtain some compensation for the defamation without having to go through the rigours of a defamation lawsuit[14].

F. NON-LEGAL RESPONSES

In addition to changes and reforms to the legal responses that are currently available to deal with pre-trial publicity, a variety of non-legal responses should be implemented in order to provide additional effective ways of dealing with pre-trial publicity and its effects upon an accused's right to a fair trial. For instance, broadening the role of press councils might be one useful way in which to deal with pre-trial publicity[15].

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[12] Although such publication would amount to contempt of court.

[13] In England, for example, the Rehabilitation of Offenders Act 1974 (U.K.), as discussed in Chapter 7, "The English Experience", provides that a person who has become a rehabilitated person under this legislation shall be treated for all purposes in law as a person who has not committed of, been charged with, or convicted of the offence which was the subject of that person's criminal record. Thus, a media defendant who publishes information relating to this original offence may not be able to rely on the defence of justification, since the offence is deemed by the legislation to no longer exist.

[14] The law of defamation in general needs change and reform. For instance, the presumption of a defendant's malice and falsity is troubling, and consideration should be given to changing the law to require the plaintiff, as is the case in the United States, to establish some degree of fault on the part of the defendant.

Press councils, which exist in all Canadian provinces except Saskatchewan, are voluntary organizations composed of representatives from the participating newspapers[16] that belong to the council as well as members of the general public[17]. The primary functions of the press council are to deal with complaints from the general public about the conduct of the press; to serve as a liaison between the press and the public; and to defend freedom of the media and the right to free access of information[18]. In dealing specifically with complaints from the public, the powers that press councils possess are generally those of censure, comment, and suasion. In other words, while the press council may find that a newspaper has behaved improperly in its coverage of a particular story, all the press council can do is to censure the newspaper and to make suggestions that the newspaper may or may not choose to carry out[19]. The press council cannot require the newspaper to take any particular action.

At present, the press council cannot discipline the press and other news media with respect to the improper publication of information that will prejudice an accused's subsequent criminal trial. In order to make these councils more effective means of dealing with pre-trial publicity, consideration should be given to broadening the scope of press councils so that they can be authorized to control and discipline newspapers and other media organizations which publish news and information which will threaten an accused's right to a fair trial[20]. As well, greater publicity should be given to press councils and to the functions they serve, so that Canadians can be aware of the existence of these councils as a means of dealing with pre-trial publicity in particular and with media misconduct in general.

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[15] The following discussion of the role of press councils is taken from two sources: J.A. Taylor, "The Role of the Press Council", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 159; and a telephone discussion with the Administrator of the Alberta Press Council, February 26, 1991.

[16] With the exception of Quebec, provincial press councils do not include electronic media organizations: Administrator, ibid.; Taylor, ibid. at 160.

[17] The Alberta Press Council, for instance, is a voluntary organization that consists of a total of 17 members, with 7 senior journalists from participating daily newspapers in Alberta; 1 senior journalist from participating weekly newspapers in Alberta; 8 members from the general public; and a Chairman who is not a journalist and who is not associated with the media: Administrator, ibid.

[18] Administrator, ibid.; Taylor, supra, note 15 at 160.

[19] Taylor, ibid. at 159. As the Administrator described it, ibid., the press council operates as a sort of "gentlemen's agreement".

Other non-legal responses that should be implemented in order to deal with the problems created by pre-trial publicity include the establishment of a professional code for the media which would set out guidelines on the publication of information concerning a pending criminal trial and which would set out internal controls on such publication to be followed by media organizations[21]; the provision of better training for members of the media who report on matters involving the criminal justice system; the creation of voluntary media-bar committees which would issue guidelines for the bar and for the media setting out recommended standards of conduct in situations involving pre-trial publicity[22]; and the establishment of specific rules of professional conduct for the legal profession governing what may be discussed publicly while a case is pending[23].

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[20] As was suggested by the 1968 Royal Commission Inquiry into Civil Rights (the "McRuer Commission"): Taylor, ibid. at 160. Such a broadening of the scope of press councils might result in newspapers deciding they no longer wish to participate in the council. Participation in press councils might well need to be mandatory in order to ensure that press councils are able to carry out their work of controlling and disciplining those media organizations responsible for prejudicial pre-trial publicity.

[21] M.D. Lepofsky suggests, in Open Justice: The Constitutional Right to Attend and Speak About Criminal Proceedings (Toronto: Butterworth & Co. (Canada) Ltd., 1985) at 325, that these guidelines should regulate the manner in which the media covers criminal proceedings, and should address such issues as if and when an accused's or suspect's name should be reported; how to ensure the accurate and balanced reporting of evidence given at criminal proceedings; and if and to what extent the publication of editorial comments on pending proceedings is appropriate.

III. CONCLUSION

The problems created by pre-trial publicity are not likely to disappear in the foreseeable future. Indeed, the combination of the public's insatiable desire to know the details of criminal matters[24], particularly when these matters are sensational or involve well-known people, and the media's need to give the public what it wants in order to attract the largest possible audience, virtually guarantees that pre-trial publicity will continue to pose a significant risk to the effective functioning of the criminal justice system.

While changes to the legal responses that currently exist to deal with pre-trial publicity and the implementation of various non-legal responses may go some way to alleviating the problems caused by pre-trial publicity, the effectiveness of these responses depends to a large extent upon the cooperation of the media. Indeed, many of the legal responses would not be needed were the media willing to monitor and restrict what it publishes about an accused and his or her pending criminal trial. However, the media has to date been largely unwilling to take responsibility for and to control the contents of its publications. As Curran and Seaton sum up the position of the modern mass media,

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[22] In order to avoid the problems that have arisen in the United States, where guidelines issued by media-bar committees have been largely ineffective, consideration should be given to making such committees mandatory and to giving these committees disciplinary powers over members who fail to adhere to the pre-trial publicity guidelines.

[23] These rules should also apply to federal, provincial and municipal police forces and should regulate the dissemination of information by their employees concerning pending cases once charges have been laid against an accused: Lepofsky, supra, note 21 at 328-329.

[24] As A.M. Linden states, "Limitations on Media Coverage of Legal Proceedings: A Critique and Some Proposals for Reform", in P. Anisman & A.M. Linden, eds., The Media, The Courts and The Charter (Toronto: Carswell, 1986) 199, "legal issues have never been so widely publicized as they are today. The public seems to posses an unquenchable thirst for stories about the law and the courts".

> ...the press and broadcasting have become less accountable. The public means of monitoring performance is wholly incapable of coping with growth and technological change in increasingly complex industries. The press and broadcasting exercise a massive power, but it is more than ever a power without responsibility.[25]

Until such time as the media is willing to take full responsibility for what it publishes about an accused and his or her criminal trial, these legal responses will continue to be essential in guaranteeing an accused's right to a fair trial in the face of pre-trial publicity.

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[25] J. Curran & J. Seaton, Power Without Responsibility: The Press and Broadcasting in Britain, 3rd ed. (London: Routledge, 1988) at 3.

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